CASES
AND
QVESTIONS
OF
RIGHT
AND
IVDICATVRE,
Resolved in the
CIVIL-LAW.

BIBLIOTHECA LAMBETHANA

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To the Reader.

THeſe Caſes and Queſtions, being Collected in the proper language of the Civill Law, for the uſe of Students in that Profeſſion, the Author was perſwaded, to permit them to be rendred in Engliſh, that others alſo might diſcerne, that the ſtudy of that learning conduceth to the knowledge of ſome things, worthy of conſideration. It is true, that much herein may appeare forraigne, in reſpect of the conditions of perſons, and things with us; as, the quality of Slaves, or Bondmen, the compleating of full age, at the end of twenty five years, and the like: But the cauſes of doubts thereupon, and the reaſons of the Reſolutions, well conſidered, may be applied to matters uſuall, and currant amongſt us. Some Reſolutions likewiſe

may ſeem to be grounded, only upon the Authors opinion, and being compared with the Rules of Law, and other authorities may be controverted; but thoſe were intended only for ſome diſcovery, and illuſtration; concerning which, ſuch as will make farther inquiry, into the like caſes may receive better ſatisfaction, what is now offered being but an Eſſay, and is extracted only out of the Text of the Digeſts, and the figures doe ſhew the Book, the Title, the Law, and ſometimes the Paragraphs, whence the matters are taken. And it is, with hope of a good conſtruction, left to the acceptance of your diſcretion.

Alban Hall in OXFORD
June the 10. 1652.

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TITLE

TITLE I.

Of the ſtate and condition of perſons; and of the common ſtate or condition.

The ſtate, or condition of Perſons, is that right, which is inherent in themſelves, and is either Common, Speciall, or Reputed.

SECT. I.

The common ſtate or condition is that which is conſidered, in naturall and ordinary reſpects, as of Birth, Sex, Age, &c.

1 *Of a Child borne in the ſeaventh month.* D. 1. 5. 11.

A Woman being delivered of a ſonne, in the ſeaventh month after ſhe was married, It was doubted, whether the child were lawfully begotten? Whereupon *Paulus* gave his opinion, That it was received as a thing unqueſtionable, from the authority of *Hippocrates*, that learned Phyſitian, that a perfect child may be borne in the ſeaventh Month, and that

 therefore

therefore the child ſo borne ought to be held a l
full ſonne.

2 *Of diverſe Children borne at the ſame time.*
D. 1. 5. 15.

A *Recuſa* a bondwoman, by her Maſters
was made free, when ſhe ſhould be deliv
of three children, At her firſt lying do
ſhe was delivered of one, at the next of three
dren; It was queſtion'd whether any of the
dren ought to be held free-borne? *Tryphonimus*
ſwered, That it was not to be doubted, but that
laſt of the fower, was borne free, Becauſe na
doth not ſuffer two infants at the ſame time, t
delivered out of the Mothers Wombe, ſo tha
might be diſcovered which was borne in the
of her ſervitude, and which afterward in the
of her freedome, ſhee her ſelfe becomming free
ſoon as the third child was borne: *Vlpian* ſaies
the ſame rule holds, if ſhe were delivered of tw
the firſt birth, and of two other at the ſecond
both of the ſecond birth cannot be borne free,
the ſecond only, and if by reaſon of uncertai
there be any doubt, it is a queſtion of fact, n
Lawe.

3 *Of a Male child borne before a Female.*
D. 34. 5. 10. & 11.

FReedome was given to a bond woman, whe
ſhould be delivered of a male child, It ha
ned that at the ſame time ſhe was deliv
both of a male and of a female; It was queſti
which of them was held to be free borne? *V*
anſwered, That if it were certaine that the

ild was first borne there was no further question
be made, either of the Mothers freedome, or of
e daughters, but if the daughter were first borne,
pon that birth neither the Mother nor any of the
ildren became free, but if it were doubtfull which
as first borne, and that doubt cannot be cleared
proofe, he saies in such cases, the most favourable
dgement is to be given, and upon presumption
at the male child was first borne, the mother shall
held free, and the daughter as borne of a free
oman.

4 *Of an Hermaphrodite.*
D. 1. 5. 9. & 10.

IN many points of the Law saies *Papinean*, the condition of a Woman is inferior to the condition of a Man, Whereupon *Vlpian* saies, It as questioned to whether sex an Hermophrodite as to be referred, and he addes for his opinion, hat it ought to be referred to that sex which appears most prevalent.

5. *Of the computing of Age.*
D. 28. 1. 5. & 40. 1. 1.

A Man is allowed by Law to dispose of his goods, in his last will when he hath compleated the age of fourteen years. Whereupon was question'd whether it were requisite that he ould have past his fourteenth yeare, or it were fficient to have attained to the last period thereof, for example, if one that was borne on the first ay of January, did make his will on the same day, the fourteenth yeare of his age, whether the will were good in regard the whole day was not spent, nd therefore the yeare was not fully compleat. *Vl-*

pian anſwered, That the will was good, yea fa
that it had been good, if it were made, any tim
ter midnight of the day preceding, becauſe,
ſpace of a day, being the period of the yeare, at
houre, having attained to the laſt day, he
be ſaid to have compleated his fourteenth yeare
reſolves the ſame in the caſe of making a bond
free, which none could doe, but he which had
pleated the age of twenty years, which are
compleat in the like manner, For the Law is
that he ſhall be permitted who is paſt the ag
twenty years, but he ſhall be reſtrained who is
in that age, and he cannot be ſaid to be within
age, who hath attained to the laſt day of the tw
tieth yeare.

6 Of a Father and a Sonne periſhing together.

D. 34. 5.8. §. 1.

WHen a Father together with his ſonne
riſhed in the Warres; and the Father
ing the Mother of the ſonne, ſuppo
him to have dyed after his Father, claymed th
ſtate, as deriv'd from the ſonne unto her; and
male kindred of the Father, as heirs to him, ſup
ſing he ſurvived, interpoſed for the ſame. The
perour *Hadrian* reſolved that the father dyed
and *Typhoninus* agrees unto it, if the ſonne were
a child, If *Lucius Titius* ſaies he, together with
ſonne above the age of fourteen years, whom
will he had made his heire dyed together, It is
derſtood the Sonne ſurvived the Father, and
his heire, ſo that his inheritance is transferred
his ſucceſſors, But, ſaies he, if the ſonne were un
the age of fourteen years, the Father is held to
live the Sonne, unleſſe the contrary be proved.

SEC

SECT. II.

Of the ſpeciall ſtate, or condition of perſons.

The ſpeciall ſtate or condition of perſons is that which hath relation to the Civill Law, or Law of the Country, either of private perſons, as of Freemen, Cittizens, married people, Tutors, Curators &c. Or of publique place, as Senators, Magiſtrates, Officers and the like.

1 *Of Freedome bequeathed in the ſecond yeare after the Teſtators death.*

D. 40. 4. 41.

ONe in his laſt will ordained in this manner. I will that *Stichus* my bondman ſhall be free in the ſecond yeare after my death. It was queſtioned what time of ſecond yeare, was conſiderable in this caſe. *Pomponius* anſwered that it was moſt probable, that the ſtator intended at the beginning of the yeare, re is much difference betwixt theſe words, In the ond yeare, and After the ſecond yeare, for we wont to call it the ſecond yeare, when any part the yeare is come or paſt, ſo that he that is pointed to be free in the ſecond yeare, is appointed to be free in all the daies of the ſecond yeare

yeare, in which opinion agrees that of *Labeo* w
saies, If freedome be bequeathed in these words,
will that *Stichus* be free within a yeare after
death, he shall be free presently after his death,
he saies, if he shall will that his bondman shall
free, if he give ten pounds to his heire within
years, if he pay it presently, he shall be free with
any further delay.

2 *Of freedome bequeathed in consideration of service to be done.*

D. 4. 4. 44.

Mævia bing ready to dye, made her bo
man *Saccus* and her bondwoman *Eut*
and *Hyrene* free in these words, I will
Saccus, *Eutichia*, and *Hirene* my bondservants be
fee upon this condition, that they monthly
turnes, light tapers in my monument, and perfo
the rites belonging to my corps. When *Saccus*,
tichia, and *Hirene* had failed in their due attenda
as was appointed, It was question'd whether
might enjoy their freedome. *Modestinus* answe
that it could not stand with *Mævias* meaning
was it implyed in her words that their being f
should depend upon their attendance, that be
duty to bee done by free persons, and that it wa
ther a consideration why she made them free, th
condition, whereby their freedome should be
spended, howsoever it was proper for the Judge
Magistrate to compell them to performe that
which the testatrix had enjoyned.

D. 1.

3 *Of perſons Free-borne.*

D. 1. 5. 5.

THoſe perſons are held ingenious, or of free condition who are borne of a free woman, and it is held ſufficient that ſhe was free when ſhe was delivered although ſhe were a bond woman when ſhe firſt conceived with child, and likewiſe if ſhe were free when ſhe conceived, and afterwards were become a bond woman when ſhe was delivered, it was held, that the child borne of her was free, becauſe the calamity of the Mother ought not to prejudice the child in her wombe. It was further queſtioned, If a bond woman conceived or proved with child, and afterwards was made free, and then before ſhe was delivered, became and continued a bondwoman, ſo that the child was both conceived, and borne in bondage whether this child was borne free? and it was reſolved for the good of the child, that it ought to be held free-borne, it being ſufficient for the child in the wombe, to have had the mother free in the middle or mean time, betwixt the conception and the birth, Becauſe, as *Paulus* ſaies, if there be any queſtion concerning benefits belonging to the child in the wombe, it is reſpected as already borne.

4 *Of a Citty or Corporation.*

D. 3. 4. 7.

VLpian ſaies, If any thing be due, or owing to a City or corporation it is not due or owing to the particular perſons thereof, nor if the City or corporation be indebted, are the particular perſons bound to make ſatisfaction for the ſame, but

he saies, The Successors of the City or Corporat ought to make good, what others formerly cont cted, and it makes no difference whether all rema or part, or whether the first persons be whe changed, insomuch that if the corporation be re ced to one person, he may sue, or be sued in t name of the whole.

5 *Of one returned out of Captivity.*
D.49.15.5.& 12.§.9.

HEE that is taken prisoner by enemies comes their bondman, but if he returne ag into his country, hee is forthwith resto to his former condition, saith *Pomponius*, unless chuse rather to returne to the enemy. And so it w resolved in the case of *Atti'ius Regulus* (who be taken prisoner by the Carthaginians, was by th sent back to Rome) that he could not recover former condition, because he had obliged himse by oath, to returne to Carthage. And therefore wh a dispensation was proposed, touching *Menande* forreyner, who had receiv'd freedome amongst Romans, That norwithsta ding he, being imploy as an Interpreter, was sen back into his own cou try, he should continue a Citizen of Rome, It w held unnecessary. For if he had a purpose to rem in his own country he would cease to be a Citi of Rome, and if he had a mind to returne thither gaine, he would continue a Citizen although dispensation to that purpose was granted. It is therwaies saith *Tryphoninus* in the case of a bond s vant, for if he be taken prisoner and made free the enemies, if his Master shall recover him, a bring him within the Roman territories he shall maine his bondman, although he have a desire to turne back unto the enemies, Because as *Sabi* wri

writes, Every man hath a free power to make himſelfe a Citizen where he liſteth, but cannot diſpoſe of another mans right.

6 Of one delivered up to the Enemies.

D. 50. 8. 17.

IF any one laied violent hands upon an Ambaſſadour of the Enemies, he ought, ſaith *Q. Mucius*, to be delivered up unto them, whom if the enemies refuſed to receive, It was queſtioned whether he continued a Citizen of Rome? and ſome were of opinion, That he did continue ſo, others held otherwiſe, Becauſe whom the people of Rome delivered up into the power of the Enemy, they ſeemed to deprive of the priviledge of a Cittizen, as much as if they had baniſhed him out of their dominions, of which opinion was *Publius Mucius*; and this queſtion was eſpecially moved in the caſe of *Hoſtilius Mancinus* concerning whom by a ſpeciall Law it was ordained, That he ſhould be held a Citizen of Rome, although he had been delivered unto, and refuſed by the enemies, in conſequence whereof, he afterwards bore the Office of Prætor.

7 Of marriage accompliſht.

D. 3. 1. 15.

A Marriage was held compleat, when the Woman who had given her conſent was led, or brought home to the Husbands houſe. & thereupon *Vlpian* being conſulted, anſwered, That if a legacy were given to a woman, upon condition when ſhe was married to one of ſuch a family, ſaid it became due as ſoon as ſhe was brought within his dores, although it ſo happened, that ſhe never entred into his chamber, becauſe it is conſent, not carnall company, that makes a marriage: & ſo *Cinna* reports that

that when one had brought home his wife, a
that evening, going abroad to ſupper, fell into t
river *Tyber*, and was drowned, it being thereup
queſtioned, whether ſhe ought to obſerve the uſu
time of mourning, as for her husband, it was reſo
ved that ſhe ought.

8 *Of a Tutor appointed by a name uncertaine.*

D. 26. 2. 30.

ONe in his will apointed *Titius* to be Tutor
his ſonne, there were at the ſame time tw
to wit the Father and the ſonne, whoſe nam
were *Titius*, and it did not appeare which of the
was intended by the Teſtator, It was queſtion
who in point of right, ought to be eſteemed as Tut
Paulus anſwered, that he ought to be eſteemed
ſigned, whom the Teſtator intended, but if that
not appeare, the right was not wanting, but t
proofe, and therefore neither of them was to be he
as Tutor.

9 *Of a Tutor appointed in caſe another was not living*

D. 26. 2. 33.

ONe appointed Tutors in this manner, I deſi
that *Litius Titius* ſhould be Tutor to my ſo
if he be not living, then I appoint *Gaius Pla
tius* to be his Tutor, *Lucius Titius* out lived the T
ſtator, and took upon him the Tutorſhip, and th
died. *Trebatius* being conſulted whether the Tuto
ſhip belong'd to *Gaius Plautius* held it did not, *L
beo* was of the contrary opinion, *Proclus* concurr
with *Labeo*, but I (ſaies *Javolenus*) approve t
judgment of *Trebatius*, becauſe the words had rel
tion to the time of the Teſtators death.

D.2

10 *Of a Tutor altered by error.*

D. 26. 2. 34.

ONe who had appointed tutors in his will afterwards in a codiciall declared that he named others, becauſe he underſtood the former were dead, or might have cauſe to excuſe themſelves. It was queſtioned whether, they who were named in the will, being living at the time of his death and pretending no excuſe, did not continue Tutors. *Scævola* anſwered that as the caſe was propoſed he ſaw nothing but that they ought to continue.

11 *Of Senators Sonnes.*

D. 1. 9. 5. & 7.

MAny priviledges belonging to the ſonnes of Senators, It was queſtioned how the ſonne of a Senator ought to be accompted, whether he whoſe Father is a Senator, or he only who is borne, his father being a Senator. *Vlpian* ſaid it made no difference, whether he were borne, whileſt the Father enjoyed the dignity of a Senator, or before his Father attained thereto. *Labeo* addes That he who is borne after the death of his Father, who was a Senator, ought to be reputed a Senators ſonne, yea although the Father be degraded from being a Senator, if the ſonne were conceived before that time, and borne afterwards, he ſhall rather be held a Senators ſonne, then otherwiſe, for moſt are of opinion that the time of conception ought to be regarded. *Vlpian* ſaies farther, That if one have both his Grand-Father, and his Father Senators, he ſhall be held the ſonne, and grand-child of a Senator: Whereupon, it is againe queſtioned, whether if the Father were

were degraded, before the ſonne were conceived (although he have not the reputation of a Senator ſonne) he may not be reſpected as the Grand-child of a Senator; and it is held (ſaies he) that he may ſo that the dignity of the Grand-father ſhall more availe him, then the diſgrace of his Father ſhall do him prejudice.

12 *Of Senators Wives and Daughters.*

D. 1. 9. 8. & 12.

SEnators Wives, and Daughters are held honorable, becauſe Husbands communicate their honours to their Wives, & Fathers to their daughters: but it is queſtioned, whether they continue ſo when they are married to men of a lower rank. *Vlpian* ſaies, that as long as they continue ſingle, or are married to men of equall degree, they retaine their dignity, not otherwiſe; and therefore if Women, who were married to ſuch as have borne the Office of Conſul, afterwards became Wives to men of leſſer dignity, they did ſometimes, but rarely, obtaine by the Princes favour, to retaine their former condition, which favour, as he ſaies, *Antoninus* the Emperour, vouchſafed to *Julia Mamea* his coſen-germane.

13 *Of the Pro-Conſuls naming a Deputy before he enters into his Province.*

D. 1. 16. 4. & 5.

THe Pro-Conſul after he entred into the Province, which was aſſigned unto him, uſually committed authority to his deputy: and it was queſtioned, whether, if before that he entred, he appointed a Deputy, it were of force? to which *Vlpian* ſayd

ſayd, That he could not do it, for it were abſurd, that he ſhould conferre authority upon any other, before he were inveſted therewith himſelfe, and it is certaine, he hath none untill hee come into the Province, But he ſaies, if the Pro-Conſul, before he comes into the Province, doe make a Deputy, and when he comes there, continues in the ſame mind, it ought to be thought, that the Deputy, hath power and authority, not from the time of his nomination, but from the time the Pro-Conſul entred into the Province. *Papinian* ſaies, That it may ſo happen that the Pro-Conſul may make his Deputy although he be not entred into his Province, as if by extraordinary neceſſity he be ſtaied upon the way, and the Deputy may come there timely enough before him.

SECT.

SECT. III.

Of the reputed ſtate and condition of Perſons.

The reputed ſtate or condition is when perſons in common eſtimation, are held to be ſuch as in truth they are not, or may be otherwiſe, whether they be of private, or of publique quality, as Reputed free-men, Married perſons, lawfull Children, of full age, Tutors, Magiſtrates, Perſons of credit, or infamous perſons.

1 *Of Freedome enjoyed by a will which afterwards proves voyd.*

D. 40. 4. 29.

LVcius Titius put away his wife, being gr with child, and ſhee being delivered o ſonne, left it to the mercy of him t ſhould find it, This child was taken u and bred by a ſtranger, but was unknown, both the Father and Mother, whether it were living no, The Father being dead left a will, wherein vers bondmen were made free, and no menti made of the Sonne, Some years after, the ſonne b ing owned by the Mother and Grandmother of Fathers ſide, the Will being held void, he enjo the eſtate, as the proper heire to his Father, It w

then queſtioned, whether they to whom freedome was given in the will, ought to be held bondmen, or free? *Scævola* anſwered that the Sonne although he were ignorantly paſt by in his Fathers will, had no prejudice, it being made voide, but that the perſons who were made free, in that Will, and had remained in that condition, by the ſpace of five years, ſhould be reduced to ſervitude, was contrary to that favour which the Law affords to freedome.

2 *Of Perſons cohabiting as Man and Wife.*

D. 23. 2. 24. & 39. 5. 31.

IF a man not known to be married, did cohabit and keep company with a Woman, It is queſtioned whether ſhee is to be reputed his Wife, or his Concubine? *Modeſtinus* anſwered, That he who converſeth with a Woman ingenuous, or free borne, ought to be conceived to doe it rather in the way of marriage, then of keeping her as his Concubine, unleſſe ſhee were one who was known formerly to have demeaned her ſelfe diſhoneſtly? *Papinian* ſaies, it is conſiderable whether the affection, and reſpect of a Husband towards a Wife, were uſed betwixt them, their qualities being compared, and the manner of their mutuall ſociety, being obſerved, For true marriage is not made only by Indentures or writings.

3 *Of a Child borne in Wedlock.*

D. 1. 6. 6.

IT is generally held for a rule, ſaith *Vlpian*, That a child borne during marriage, betwixt the Husband and the Wife, is the Husbands child, But ſuppoſe, ſaith he, that the Husband hath been abſent

ſent from his Wife ten years, and returning fin
with his Wife a child, of a year old, In that caſe
agrees with *Julianus*, that it is not the Husba
child. But whereas the ſame *Julianus* affirmes, T
it is not to be endured that he who cohabits al
gether with his Wife ſhould diſclaime her child,
none of his, *Vlpian* admits not that without diſti
ction, but holds with *Scævola*, That if it be noto
ous, that the Husband, by reaſon of ſickneſſe,
ſome other impediment, could not lye with
Wife, or were diſabled from getting a child,
though one be borne in the ſame houſe, and
neighbours had taken notice thereof, it ought no
be reputed his child.

4 *Of a Minor, upon view, allowed by the Magiſtrate to be of full age.*

D. 4. 4. 32.

ONe under the age of twenty five years,
dreſſing himſelfe to the Magiſtrate, by ſh
ing his viſage, made a falſe proofe of bein
full age: his Curators well knowing, that he was
a Minor, continued in the adminiſtration of hi
ſtate, In the mean time after his age was allowed
the Magiſtrate, and before he had compleated
twenty five years, monies, which were owing to
eſtate, were paied unto him, and ſpent fooliſhly
him. It was queſtioned who were in danger for
miſpending theſe monies, and whether the Cura
might have been excuſed, if they had perſiſted
the ſame error, and yeelded up their adminiſtra
of the eſtate. *Paulus* anſwered, that they who
in the monies, due to his eſtate were freed by L
and ought not to be farther queſtioned for the ſa
but it is certain that the Curators, who know

him to be a Minor, did continue in that charge, ought not to have ſuffered him to receive the monies due, and are liable for the ſame; but if they had ſubmitted to the Magiſtrates judgement, and had deſiſted from the adminiſtration, and had given up their account, they had been in the ſame condition, as the Debtors who had paid the monies, and could not have been queſtioned for any thing.

5 *Of a Magiſtrate promoted by Error.*
D. 1. 14. 3.

Barbarius Philippus, being a Slave or bondman, who had run away from his Maſter, coming to Rome and living there, in the quality or eſteeme of a Free-man, was made Prætor, & diſpatched many buſineſſes publiquely, belonging to the Prætors office. It was queſtioned firſt, whether he were truly, or lawfully Prætor, in regard a ſlave or bondman was not capable of that dignity: *Pomponius* ſaid, that his condition hindered not, but that he might be made Prætor, becauſe the People of Rome, or Emperour had power to make a Bond-man Prætor, and if they had known him to be a ſlave, they might have made him free; *Vlpian* ſaies, it is certaine he was in poſſeſſion of the office of the Prætor, and makes a ſecond queſtion, whether although he ſtill continued a ſlave, whileſt he bore the Prætors office, the decrees made, and acts done by him in that time were good, and of force, for the benefit of thoſe who were concerned in them; and concludes, that it was his opinion, That none of thoſe acts or orders were void.

6 Of rich men to be preferred before others, to Offices of Dignity.

D. 50. 4. 6.

ANtoninus and *Verus* the Emperours, being c
ſulted by *Rutilius Lupus*, declared, that
conſtitution wherein it is provided, Tha
very man in the ſame order as he was admitted to
of the Common Counſell, ſhould be admitted t
a Magiſtrate, was to be obſerved when they were
fit men, and of ſufficient ability, But if ſome b
mean fortunes, and their eſtates ſo ſpent, that t
are not only diſabled to ſuſtaine places of dig
with credit, but alſo make hard ſhifts to man
themſelves, It is not profitable for them, nor
nourable for the City to conferre places of M
ſtracy upon them, eſpecially when there be oth
who with more conveniency to themſelves, and c
dit of the publique, may be choſen to thoſe pla
and therefore commanded, that the wealthier
ſons, doe not, upon pretence of any ſuch Conſt
tion, excuſe themſelves, and that they take not
That then only, the order of admiſſion into
Common Counſell is to be reſpected, when the
ſons are of ability to take upon them places of
nity.

7 *Of honeſt men not to be removed from their charge, in reſpect of poverty.*

D. 26. 10. 8. & 5.

WEE hold him ſaies *Vlpian* a Tutor worthy to be ſuſpected, whoſe manners or behaviour in his place deſerves it, For a Tutor albeit a poore man, if he be truſty and diligent, ought not to be removed, as one of whom there is cauſe of ſuſpicion, and that man may rather be doubted, who being himſelfe ſubject to ſuſpition, hath given ſecurity, for it is better for the Minor to have his eſtate preſerved, then to have writings of caution to preſerve the ſame.

8 *Of infamy ariſing from puniſhment.*

D. 50. 13. 5. § 2. & 3. 2. 22.

A Mans credit is impaired ſaies *Calliſtratus*, when retaining his freedome, yet hee undergoes ſome puniſhment, which derogates from his reputation, as when one is confined to ſome remote place, or degraded from his ranke, or debarred from bearing publique office, or if he who is a Plebeian, or of the common ſort, hath been beaten with cudgels, But *Marcellus* holds that to be true, if there were a juſt cauſe, for inflicting ſuch a puniſhment, for (ſaies he) the beating with Cudgels does not render a man infamous, but the cauſe for which he was beaten, if it were ſuch as deſerved, by his condemnation, to make him infamous.

9 *Of a mans Teſtimony rejected.*

D. 3. 2. 21.

Lucius Titius ſued *Gaius Seius* in a cauſe of in
ry, and to make it good, procured the depo
tions of ſome witneſſes to be read unto
Judge, who giving no credit to the depoſitions, p
nounced that *Gaius Seius*, had done no injury to
cius Titius. It was thereupon queſtioned, whet
they, whoſe teſtimonies were rejected, were to
held infamous: *Paulus* anſwered, There was nothi
conſiderable, wherefore the witneſſes ſhould
held infamous, it being unreaſonable, that by a ſe
tence juſt or unjuſt given for one, others ſhould
ceive prejudice.

TITLE

TITLE II.

Of Title to Goods or Lands, and of Common Right or Property.

Title to Goods or Lands, is that which a man hath in things Moveable or Immoveable, and is either Common, Speciall, or Reputed.

SECT. I.

Common right to things, is that which is agreeable to the Law of Nations, as Property which is the right of enjoying and disposing of a thing at pleasure, and is gained by Industry, as by taking what belongs to none else; or framing something for ones own use, or having something arising or accruing from what belonged unto him, or by the guift of some other.

1 *Of a Wild-beast, chased, and Wounded.*
D. 41. 1. 5.

IT was questioned, whether if a Wild-beast were so wounded, that it could not escape the pursuer, it were to be held forth with gained by him, who pursued & wounded it. *Trebatius* was of opinion, That it was forthwith his, and ought to be held so, as long as he pursued in chase thereof

but if he desisted from the pursuit thereof, it
ceased to be his, and might be gained by any
who should pursue, and take the same, and th
fore, if whilest he, who wounded the beast,
pursuit thereof, another steps in, and catches it,
a purpose to gaine it to himselfe, he saies, he is
ble to an action of theft, But most Lawyers else,
Gaius affirmes, are of opinion, that it is not his
wounded it, untill he doe actually take it. bec
many things may fall out, which may prevent,
hinder the taking thereof, which saies he, is the
er opinion, but the Glosse observes, that what
batius delivers, is held good by custome, and
tice.

2 *Of a Wild Beast taken in a net.*

D. 41. 1. 55.

ONe by letter, proposed a Case to *Procul*
this manner, A wild Boare chancing to
into, and so to be intangled in a toyle, or
pitched by you, was taken out and carried aw
me, Whether doe you conceive, that I carried
your Boare, and if you doe conceive it was yo
suppose I had loosed it, and let it escape into
Woods, whether had it continued, or ceased
yours? and if it ceased to be yours, what a
might you bring against me for what I had d
Proculus returned by way of answer thus; It is co
derable, whether the toyle or net were pitched
publique or private place, and if in a private,
ther in mine own ground, or in the ground of
ther man, or if in the ground of another man,
ther with his consent or without his consent;
over whether the Boare were so intangled, th
could not possibly get loose, or so that by
strug

ngling it might have eſcap'd, But in concluſion, m of opinion, ſaies he, that if it were brought ithin my power, the Boare was mine, but if after became mine, you ſet it at liberty, it did then ceaſe be mine, and I ought to have an action of the ſe ngainſt you, as it was reſolved, when one had ſt another mans cup into the Sea.

3 *Of Piggs recovered from a Wolfe.*

D. 41. 1. 44.

Pomponius handles this queſtion, When the Wolfe had taken away Piggs from my Hog heard, a Country man of a neighbouring Village, following them with his Maſtife, recovered the piggs om the Wolfe, and when my Hog-heard demanded the ſame, it was thought diſputable whether he d gained, or I did ſtill retaine the property of em, For it might ſeeme, that he gained it, after a anner, in way of chaſe, or hunting, and as things ken at Sea, or Land, if they once get looſe, ceaſe to e theirs who took them, ſo if any thing belonging o us be taken by Wild beaſts, they ceaſe to be ours, hen they are gotten out of the reach of our doggs hich purſued after them, For who will ſay, when Eagle or Hawke, hath ſnatched up Poultry, out f our Backſides, and fled away therewith, the proerty is not loſt, why ſhould not that which is taen out of the mouth of a Wild beaſt be booty to im that recovered it? as if a man hath taken a Fiſh, Hare, a Partridge, if they eſcape his hands, and anther man take them, they are his own, But *Pomonius* was of opinion, although that were true which is argued of birds, beaſts, and fiſhes, yet other things, whereof we had a property, continue ours as long as we conceive any hope of recovery, as any

thing be loſt by ſhipwrack, it doth not prefe
ceaſe to be the Owners, but if any imbezill it h
lyable to pay fowerfold. And *Vlpian* is of opini
That an Action of theft might be brought in t
caſe; for although he that purſued the Wolfe, a
recovered the Piggs, had no intention of ſteali
yet when upon demand he refuſeth to reſtore th
he ſeemed to conceale, and wrongfully to det
the ſame.

4 *Of a thing Stolne afterwards lawfully bought.*
D. 49. 15. 27.

A Bond-ſlave being taken from his Maſter,
Pirats or Robbers, afterwards fell into t
hands of lawfull enemies and being reco
red in War from them, was ſold by him who reco
red him. It was queſtioned whether he that bou
the Bond-ſlave *Bona fide*, that is, not knowing a
unlawfulneſſe therein, had a good title to him,
beo, *Oſilius*, and *Trebatius* were of opinion, that
had none, becauſe he was ſtolne at the firſt, & n
ther his being taken Priſoner by an enemy, nor
being recovered by a friend, can purge that blem

5 *Of Things Compoſed by one out af another mans Materialls.*
D. 41. 1. 7. §. 7.

COncerning things compoſed, or made out
another mans materialls; *Nerva* and *Proc*
were of opinion that he who made a n
thing for his own uſe, was proprietary thereof,
cauſe that which was new made, was no mans
before, *Sabinus* and *Caſſius* were of opinion, Tha
was more agreeable to naturall reaſon, that he w
was proprietary of the matter, ſhould be alſo ow

the thing made: and there is a middle opinion with *Gaius*, which is reputed the truer, to wit, that the thing composed, may be resolved into the matter of which it was composed, the opinion of *Sabinus* and *Cassius* should take place; as when a Vessell made of another mans matter, into which it may be resolved againe; but if it cannot be reduc'd to the same matter, then the opinion of *Nerva*, and *Proculus* should hold, as when Wine is made of another mans Grapes, or oyle out of another mans olives, into which the Wine or Oyle cānot be reduced again.

6 *Of an Island newly arrising in a River.*

D. 41. 1. 56.

A Case was proposed to *Proculus*, in this manner; An Island arose in the river, over against the borders of my ground, and at the first, was such, that it did not any way extend in length, beyond the bounds of my Land; it afterwards increased by degrees, and proceeded so farre, that it reached in length to be opposite, to the borders of the ground above and beneath, adjoyning to mine. It was questioned, whether those parts, which last accrued, belonged to me; because they were joyned to that which was mine before: or whether they now in right appertain to the other grounds, as they should have done, if at the first the Island had appeared of the same extent? *Proculus* answered; If the river in which (you writ) an Iland arose opposite to the borders of your ground, not exceeding the length thereof, be of the condition, that what is gained by casting up of the earth, becomes to be of private right, and at the first it lay nearer to your lands then to any mans else, who had lands on the other side, it becomes wholly yours, and that which afterward accrued unto it, by casting up of the earth is yours also, although

although it ſo increaſed, that it extended in le
over againſt the grounds above, or below, as
if by the ſame means, it had grown nearer to
which lay on the other ſide of the river.

7 *Of a Ground, where a river leaves its Channell.*

D. 41. 1. 56.

IT was farther demanded of *Proculus*, as follo
eth: An Iſland ariſing nearer to my ground, t
to the ground on the other ſide, and afterwa
the whole river, which before divided it ſelfe, l
ving that channell, where the greater part of it
made its current betwixt the Iſland and my grou
I deſire to know, and that you ſignify unto
whether you make any doubt, but that the Iſl
ſtill belongs to me, and that notwithſtanding,
of the ground, where the ſtreame forſook its Ch
nell, likewiſe belongs to me. *Proculus* anſwered,
the Iſland, at the beginning, being nearer to y
ground, the river leaving the greater chann
which lay betwixt the Iland, and the ground on
other ſide, and wholly took its courſe betwixt
Iſland and your ground, yet howſoever the Iſl
continues yours, but the ground or channell wh
lay betwixt the Iſland and the neighbours grou
on the other ſide, ought to be divided, ſo that
part thereof nearer to the Iſland ought to be eſte
med yours, and that which is nearer to the Nei
bours ground on the other ſide belongs to him
conceive, that when on one ſide of the Iſland,
Channell proved dry ground, it ceaſed to be
Iſland, but for the better underſtanding of the b
nes, I call that ground, an Iſland which was ſo
fore.

8

8 *Of Mony, given to the end, that he who received it, ſhould buy ſomething therewith.*

D. 39. 5. 2. §. 7.

ONe puts the caſe thus, I gave five pounds to *Titius*, on this conſideration, that he ſhould buy therewith to his own uſe *Stichus* a bond-ſervant, It was queſtion'd whether *Stichus* dying before he could be bought, I had any Action to recover the five pounds? *Julianus* anſwered, The queſtion was rather of Fact, then of Law, for if I gave the five pounds to *Titius*, to that end, that he ſhould buy *Stichus*, having no purpoſe, otherwiſe to have given it, *Stichus* being dead, I might by way of action ſue for it againe, but if without reſpect thereunto having a purpoſe to give him five pounds, underſtanding that he had a purpoſe to buy *Stichus*, I told him, I gave it, that he might buy *Stichus* therewithall, It ought to be underſtood rather an occaſion, then a condition of giving the mony, and that though *Stichus* were dead, yet *Titius* might retaine the mony.

9 *Of monies lent, to be given to another.*

D. 39. 5. 19.

IF *Gaius* lent mony to *Titius*, to be paid to *Seius*, as a gift intended to him, and *Titius* after the death of *Gaius*, gave the ſame to *Seius*: *Vlpian* anſwered; It muſt be ſayed, That whether *Titius* did know, or were ignorant of the death of *Gaius*, the mony became *Seius* his own, becauſe the mony was his that gave it, and if he were ignorant of his death he cannot be queſtion'd for the ſame, having received it, as lent, to be repaied to *Seius*, But if I gave order

order to one, to deliver mony to a third person, whom I intended it, as a guift, and he being ig rant of my death, performe the same, he shall h an action against my heyres to recover it; but if knew of my death before it was done, he shall h none.

10 *Of Mony given to one, to the end it should be given to another in the* Donors *name.*

D. 39. 5. 25.

IF I gave something to you, to the end that should give the same, in my name to *Titius*, you give it to him, but in your own name, It doubred, whether the property be transferred the by. *Javolenus* answered, If I give a thing to you, give it in my name to *Titius*, and you gave it in y own, as to the point of subtlety in Law, the prop ty is not gained to him, and you are liable to an a on of theft: but it stands with the favour of La That if I sue him, who received that thing, that may avoid my suit, by exception against my un proceedings.

11 *Of some thing, which the owner gave consent to be digged up, out of his ground, and carried away.*

D. 39. 5. 6.

ONe by way of free guift, gave me leave digge up stones, out of his Quarry, afterwa when they were digged up, forbad me to c ry them away. *Vlpian* answered, as soone as the sto were digg'd, they were mine, neither could the o ner, by forbidding me to carry them away, ma them cease to be mine, because they were mine b ki

kind of delivery. And it had been the ſame, if one hired by me, had digged them, for he digged them for my uſe, but if one before they were digged had bought, or agreed with me for them, if before he had digged them up, I had changed my mind, the ſtones had continued mine; if afterwards, it was not in my power to alter what he had done.

12 *Of a guift or grant to dwell in ſome houſes or lodgings.*

D. 39. 5. 32.

Lucius Titius wrote a letter to *Seius*, to this purpoſe, You may make uſe of ſuch lodgings as long as you pleaſe; and for ſuch upper roomes, you may enjoy them freely: and that you might know, it is my will, that you ſhould ſo doe, I wrote this letter unto you. It was queſtioned, whether after his death, his heires might not forbid *Seius* any longer to dwell in, or make uſe of the ſame: *Scævola* anſwered, that as the caſe was propoſed, the heyre of *Lucius Titius*, might be of another mind.

13 *Of a guift given by way of reward.*

D. 39. 5. 27. & 34.

Aquilius Regulus a young man, wrote to *Nicoſtratus* in this manner; Becauſe you alwaies cohabited with my Father, and I my ſelfe have much profited by your eloquence, and diligence, I give, and permit, that you ſhould dwell in, and have the uſe of ſuch a lodging, *Regulus* being dead: *Nicoſtratus* was interrupted by the heyre, who intended, to make the grant voyd

voyde, for the future. He thereupon consulted *Papinian*, who told him, it was not a meere free guift but that *Regulus* requited him, as with a reward, the paines which he had taken with him, and therefore it being of another condition, then a meere free guift, he ought to enjoy the Lodgings, as long as he lived, which agrees with what *Paulus* delivers the like case, to wit, if one recover another out of the hands of Theeves, or enemies, and in that respect receive something from him; this kind of guift, is altogether irrevocable; for in truth, it ought to be esteemed a recompence of an extraordinary service, which proceeding out of the consideration of his deliverance, is not to be valued in an ordinary way.

14 *Of a guift of a thing Morgaged to another before delivery.*

D. 39. 5. 31.

Lucius Titius gave to *Mævia* by word of mouth a certain ground, and within few daies after before he had given possession thereof to *Mævia*, mortgaged that ground to *Seius* for a summe of mony, and within thirty daies after, he put *Mævia* into quiet possession thereof. It was question whether the guift were sufficiently confirmed, *Servola* answered, as the case was proposed, it was sufficiently confirmed, but yet so, that *Seius* the Creditor had still a strong obligation thereupon.

15

15 *Of a Guift, voidable by the death of the Donee, before the Donor, both happening to depart the ſame time.*

D. 39. 6. 26. & 24. 1. 32: §. 14.

THe Declaration of the Emperour *Antoninus* concerning guifts, paſſing betwixt Husbands and Wives, ſhewes, that if the Donee dye before the Donor, the guift is of no moment. It is thereupon queſtioned, what may be reſolved, if they both dye at the ſame time, as it may happen by burning, or fall of a houſe; *Vlpian* anſwers, that if it can appeare, which of them expired firſt, the queſtion is ſoon reſolved; but if it cannot appeare, the doubt is more difficult: but he is rather of opinion that the guift is good; and grounds his opinion upon the words of the Declaration, which ſaies, If the party who received the guift ſhall firſt deceaſe, but that party doth not ſeem to deceaſe firſt, when both deceaſe together at the ſame time, and therefore if, after guifts beſtowed from each to other, both dye together, it may very rightly be ſayed, that the guifts on both ſides, are of force.

16 *Of goods delivered in reference to a Dower.*

D. 23. 3. 9.

Sempronius delivered goods to *Mævius*, to the intent, that if *Mævius* married his Daughter they ſhould be for her Dower, or Marriage portion; but *Sempronius* dyed before the Marriage, and after his death *Mævius* married the Daughter; It was queſtioned, whether the Marriage enſuing, thoſe goods became her Dower: *Vlpian* ſaid, he doubted whether the property of the goods, were transferred on him

to

to whom they were delivered, becauſe the tranſl
on of the property, was in ſuſpence, untill the M
riage was done, and at the time of the Marriage,
property was in *Sempronius* his heyre, from who
it is undeniable, that it could not be transfer
without his conſent: But he was of opinion, that
the favourable caſe of Dower, the heyre ſhould
compelled, to give his conſent, to what his Fat
intended, that his Siſter might not be left with
a Dower.

17 *Of a Dower given upon condition that part thereof be repaied to Children.*

D. 23. 4. 23.

THe father giving a Dower, or Marriages p
tion with his Daughter, Covenanted with
Husband, that if ſhe dyed leaving one, or m
children behind her, the Husband ſhould be cont
ted, with the third part, and that the reſt ſhould
repaied to him the Father; or after his death, to
children as ſhould remaine; the Father dying f
the Daughter dyed afterwards, leaving children
was queſtioned, whether by vertue of that coven
the children might ſue for the reſt of the Dow
the Grand-father dying before the Daughter. *A*
canus anſwered that they might ſue; for the force
the covenant conſiſted in that, if ſhee dyed dur
the Marriage with the Husband, the *D*ower ſho
be reſtored: and it was all one in effect, as if
contracted conditionally, that when ſuch a
ſhall returne out of *Aſia*, you ſhall give to me, or
ter my death, to *Lucius Titius*, tenne pound; for
though the ſhip returne not, untill after his de
the ten pound is due to his heyre.

18

18 *Of a Covenant of diſpoſing the Dower, in caſe the Mother ſhould dye before her Child, or the Child ſhould dye before the Mother.*

D. 23. 4. 23.

IT was agreed betwixt the Father in Law, & the Sonne in Law, that if the Daughter, or Wife dyed, leaving a child of a yeare old behind her, the whole Dower ſhould remaine with the Husband; but if in the life time of the Mother, the child ſhould dye, the Husband ſhould returne a moyety of the Dower, unto the Father in Law. It happened that the Mother, and the Child being in a ſhip, which was caſt away, were both drowned together: whereupon it was queſtioned, what part of the Dower might be retained by the Husband, *Papinian* anſwered, That it being moſt probable that the Child periſhed before the Mother, the Husband ought to retaine only a moyety thereof.

SECT. II.

Of Speciall Right or Commodity.

Speciall Right is that which is grounded on the Civill Law, as Commodity, or the Right which one hath to receive benefit, out of things belonging to other men; as to receive the use and profits of Lands during life, or to have some use and conveniency in or from another mans possessions; as a way, passage, or Water-course, or the like: which Rights are gained by Prescription or graunt, &c.

1 *Of the Vse and Profits of a thing given to a Corporation.*

D. 7. 1. 56.

WHen the property being reserved to one, the profits are given to another, they are generally given during the life of the party, to whom they are given; whereupon one giving the fruits and profits of some land to a *City* or *Corporation*, It was questioned, whether the City or Corporation might bring an action for the same, it seeming unreasonable, that those profits should be alienated from the property for ever, because they can not

cannot be determined by death, as it is uſuall when they are granted to a ſingle perſon, (a *Citty* or *Corporation* never dying) and ſo the property, to the granters heyres, would be of no uſe, the profits alwaies going another way; yet *Caius* ſaies it was reſolved, that the *Citty* or *Corporation* might bring their action; whereupon it was farther queſtioned, how long they ought to be maintained in receiving ſuch fruits and profits; and it was reſolved, for a hundred years, becauſe within that time, the longeſt livers dye.

2 *Of Rent due for Profits formerly received.*

D. 7. 1. 58.

ONe gave the profits of ſome Land, to his Daughter during her life, and the property of the ſame, to the *Common-wealth*; the Daughter dyed in the month of December, all the fruits and profits of thoſe lands, being received by her tenants in *October* before, for which they were to pay their rent in *March* following; It was queſtioned, whether the heyre of the Daughter which dyed before that day, had right to receive the whole rent due for that yeare, or whether it ſhould be divided betwixt the heyres of the Daughter, and the *Common-wealth*, to whom the profits belonged after her death: *Scævola* anſwered, That the *Common-wealth* had no right to receive any thing from the Tenants, But the heyre of the Daughter, as the caſe is put, ought to receive the whole rent.

3 *Of the profits of a Parke or Warren.*

D. 7. 1. 62.

IF the Uſe, and Profits of a Parke or Warren granted to one during life, it is queſtioned, whether he might take or kill the Deare, and Conies, which he found therein; or hath right only ſuch, as by his induſtry are brought into the Parke or Warren, or are afterwards bred therein. *Trypheninius* anſwered, It was a hard thing to diſtinguiſh the particulars, which were firſt, and which come in afterwards, and therefore that his right be not altogether uncertaine, he held it ſufficient, if the Grantee when he dyes, leaves to the proprietory, all ſorts, as many as he found.

4 *Of Profits, and Property Conſolidated.*

D. 7. 4. 17.

SEmpronius gives the profits of his Land, during life to *Seius*, ſimply; and the Property thereof *Titius*, upon condition: *Seius*, to whom the profits were given, (the event of the condition yet depending) buyes of the heyre of *Sempronius*, the Right and Property, which then was in him, whereby his right as uſufructuary is conſolidated, with the right of Propriety; afterwards the condition being fulfilled, the property of the Land fell out to be in *Titius*. It was queſtioned, whether *Seius* had ſtill the right as uſufructuary to the Profits, in regard *Titius* had only the property given unto him, without the fruits, and profits, belonging to *Seius* during his life, *Julianus* anſwered that *Seius* having drowned his right as uſufructuary to the profits, in purchaſing the property, by conſolidating the ſeverall intereſt

T

The rights which before were distinguished, being made one, *Titius* shall have the sole, and full right in the Land, and *Seius* by his own act loose the right of all profits, as usufructuary to the same.

5 *Of a Way, or Passage granted indefinitely by will.*

D. 8. 1. 9.

IF a man grant unto another liberty to have a way through his ground, without limitation, It is questioned, whether the heyre of the granter, or the legatary, shall assigne the space of the way. *Celsus* saies, that the Legatary may make his choyce through any part of the ground, as he shall please, yet after a civill manner; for that in generall words, some things are tacitely excepted, and therefore he shall not make choyce to goe through his Back-side, nor through his Vineyard, when he may conveniently goe some other way with lesse dammage to the ground, through which the way is granted. But this is certaine, that what way at first, he made choyce of, he must continue to use the same; and hath no power afterwards to make another choyce: & with *Celsus*, *Sabinus* concurres, who confirmes the opinion, from the grant of a Water-course, which at first a man may have liberty to derive as he shall think fit, but after-wards he shall not draw it into any other channell.

6 *Of a way Tacitly reserved.*

D. 8. 3. 41.

Æmylius gave in his will to *Olympicus* the use of a house to dwell in, and left an Orchard, a Banqueting house, which lay behind it un- ſpoſed; the only paſſage thereunto being thro the houſe bequeathed, it was queſtioned, whe *Olympicus* were bound to allow that paſſage to heyre of *Æmylius*; *Scævola* anſwered, that it not due by way of ſervice from the houſe, bec no mans land, or houſe, can owe ſervice to himſe But that the heyre ought to have right to paſſe way, without giving offence to *Olympicus*.

7 *Of Service retained by parts.*

D. 8. 3. 34.

IF the ſame ground be held in common by men, one of them, by ſuffering a third perſon, paſſe himſelfe, or to drive his cattell thro that ground, cannot create a ſervice to the third ty. And for the ſame reaſon, ſaith *Papinian*, if grounds, which owed ſervice each to other, come common to the ſame owners, becauſe (though ſervice cannot be acquired in part) it may retained by parts; the ſervice due from the one the other, ſhall not be extinguiſhed. For alth neither of the part-owners, be a ſingle perſon whom the ſervice belongs, yet becauſe the ſervice due, not to the perſon, but to the grounds, neith can freedome from the ſervice be gotten, nor gain in part by one, nor the ſervice in part be remitt by the other.

8 *Of a Service recovered after neceſſary diſuſe.*

D. 8. 3. 34. & 35.

Papinian puts a queſtion, If he who had a right to bring water into his ground, from a ſpring in the ground of another man, and that ſpring, having grown dry a long time, begin to run freſh againe, whether by not uſing it, the right be loſt? *Paulus* reſolves it by a precedent which *Atilicinus* relates. *Cæſar* ſaies, he wrote to *Statilius Taurus*, in this manner, Some who were wont to draw water from a ground called *Sutrinum*, propoſed their caſe unto me, to witt, That having for diverſe years uſed to receive water out of that ground into their own, the ſpring growing dry, they could not receive it, as they formerly had done; and that afterwards, the ſpring began to come againe: and they deſired, that in regard they had failed of uſing their right, not out of any fault, or negligence of theirs, they might be reſtored unto their former right; whoſe requeſt ſeeming to me not unreaſonable, I thought fit, they ſhould be relieved; and therefore, it is our pleaſure, that what right they formerly had, be againe continued unto them.

9 *Of a Service not to Fiſh in the Sea.*

D. 8. 4. 13.

ONe who had two Lordſhips adjoyning, both lying neare the Sea, the one being called *Hieronianum*, the other *Botrianum*, ſould the former with this condition, that he who bought it, and thoſe who ſhould after enjoy it, ſhould not uſe before, or neare the place, to take a ſpeciall kind of Fiſhes, as for example Haddocks, in the Sea; It was

queſtioned whether the condition were good; i
regard no man, by private authority, can reſtra
the liberty of fiſhing in the Sea. *Vlpian* anſwers, a
mitting that the Law allowed a liberty of ſuch fi
ing; yet true and honeſt dealing requires, that t
condition, made upon the ſale, ſhould be obſerve
and therefore, that both the buyer and his ſucceſ
may be obliged to obſerve the condition.

10 *Of the Vſage of ſome, not profiting others.*
D. 8. 6. 16.

THree Neighbours, which had ſeverall ground
had all right to admit water into the
grounds, from a ſpring ariſing in a ground a
joyning: one of them diſuſing his right, ſo lo
time as was ſufficient to make him looſe it; the o
ther two continued the uſe of bringing the wat
into their grounds: It was queſtioned, whether b
the uſage of thoſe two, the right of the other we
not preſerved. *Proculus* ſaies, his right is loſt: B
if the right had been, to bring the water into
ground, which was common to three, although tw
had ſo long time diſuſed it, by the uſage of the thir
the right of all had been maintained.

SECT

SECT. III.

Of Reputed Right.

Reputed Right is that which one hath in his own and others opinion; as Poſſeſſion fairely gotten, which is when one by lawfull means gaines ſomething, which without his privity belonged to another man, whereby he hath a kind of right to uſe, and diſpoſe thereof, as if it were his own, untill the true owner makes his claime or title appeare.

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1 *Of Poſſeſſion taken by Errour.*
D. 41. 2. 34.

TItius having bought a ground of *Mævius* called Long-acre, *Mævius* gave him poſſeſſion of a ground called Broad-acre. It was queſtioned, whether he had gained the poſſeſſion thereof. *Vlpian* ſaid, if both intended the ſame groũd, although there was a miſtake in the name, the poſſeſſion was well enough taken: But if there were a miſtake both in the name, and

and in the ground, he had gained no poſſeſſion: It was farther queſtioned, whether although *Mævius* had not gained, yet *Titius* had not loſt his poſſeſſion in that ground; becauſe a man out of his own mind and thought, may quit, and yeeld his poſſeſſion, as *Celſus*, and *Marcellus* write; which although in ſome caſes it may be admitted, yet *Vlpian* ſaies, that where the errour concernes the thing it ſelfe, no man can get the poſſeſſion; neither in that caſe ſhall a man looſe his poſſeſſion, when he intended to yeeld it conditionally, if ſuch an one ſhould ſucceed him therein.

2 *Of Poſſeſſion retained of a thing hidden.*

D. 41. 2. 44.

Titius intending to take a journey, for better ſafety, did hide a pot of Mony in the ground, and when he returned, having forgotten the place where it was hid, could not find it, It was queſtioned, whether he having forgotten the place ceaſed to have the poſſeſſion of the mony, or if he afterwards remembred the place, whether he preſently, began to have again the poſſeſſion thereof? *Papinian* anſwered, that he that hid the mony, retained the poſſeſſion thereof, neither did the failing of his memory prejudice him therein, as long as no man elſe had ſeized the ſame; otherwaies it might be conceived, that a man loſt the poſſeſſion of his ſervants or bond-men, as often as they removed out of his ſight. It was farther queſtioned, whether the poſſeſſion were retained, if the mony were hid in another mans ground; and he likewiſe anſwers, that the poſſeſſion continues the ſame, unleſſe the mony were removed; it being all one, whether the owner be poſſeſt thereof, in his own, or in another

man

mans field, or whether he be poſſeſt thereof above or under ground.

3 *Of Fruits belonging to the poſſeſſor, when they are ſevered from the ground.*

D. 41. 1. 48. & 6. 1. 78.

IT is without queſtion, ſaies *Paulus*, That he which, *bona fide*, buyes any thing, although it truly belong to another man, gaines the profits thereof in the mean time; not only thoſe, which proceed from his own endeavour and induſtry, but which way ſoever they ariſe. Becauſe as to the fruits and profits of the thing, he is almoſt inſteed of the owner: but it was queſtioned, what if the true owner claime them, before they be carried away. He anſwers, that they become the poſſeſſors own as ſoon as they are ſevered from the ground: and therefore, when *Labeo* elſewhere delivered, that an unjuſt poſſeſſor of the ground, was not anſwerable, if he had not carried away the fruits, *Paulus* reprehends him, ſaying, It is the ſame, if he medled with them in his own name; for ſaith he, we ought to underſtand, fruits to be received, not only when they are carried away, or converted, but when they are firſt gathered, as when Olives or Grapes, are taken from the boughes, although they be not converted into Wine or oyle; for by gathering them, one ſhall preſently be reputed to have received the ſame.

4 *Of*

4 *Of charges laid out uſefully, by one in Poſſeſſion.*

D. 6. 1. 38.

ONe who unadviſedly bought a ground belonging to another man, beſtowed monies in building, and planting thereupon; afterwards the ground was recovered by the true owner: It was queſtioned, what remedy he might have for his expenſes. *Celſus* ſaies, It is a buſines which a good Judge ought to determine, taking into conſideration the perſons, and the circumſtances thereof: For ſaies he, Imagine there was nothing done, but what the true owner would have done himſelfe, it is reaſon he ſhould repay the expenſes, ſo far as his ground is improved thereby: but ſuppoſe he be a poore man, and cannot pay ſo much, unleſſe he ſhould ſell himſelfe out of houſe and home: It may be ſufficient, to take away, of what he beſtowed there, what may be done conveniently, ſo that the ground be not thereby made worſe then it was before; and this is thought juſt, that if the owner of the houſe, will give as much as it may be worth to the other, to have the things taken away, he may retaine thoſe things: for the Law does not favour any deſpitefull doings; as if he would take away rough-caſt beſtowed upon the wall, or deface pictures, whereby he ſhould gaine nothing, but to doe to another a diſcurteſy.

5 *Of Windowes and doores ſet up in another mans houſe.*

D. 1. 6. 59.

ONe, who was but a Tenant, ſet up Windowes and doores in his Land-Lords houſe; after a year, the Land-Lord took them downe: It was queſtioned, whether he that ſet them up might not claime them. *Julianus* anſwers, he might, For thoſe things

things, which are faſtned to another mans houſe, as long as they continue faſtned, are held to belong to the houſe; and as ſoon as they are ſevered from it, returne to their former condition.

6 Of one that ſold another wans houſe, becoming heyre to the true owner.

D. 6. 1. 72.

Gaius bought a houſe of *Titius*, which in truth did belong to *Sempronius*, and having paid the price, was put in poſſeſſion thereof: afterwards *Titius* proved to be heyre to *Sempronius*, and went about, to ſell the ſame houſe to another man. *Vlpian* ſaid, It was great reaſon that *Gaius* ſhould be preferred before any other; for if *Titius* himſelfe after he became heyre to *Sempronius*, ſhould have ſued *Gaius*, there lay a juſt exceprion againſt his action; and if *Gaius* ſhould have ſued him to make his title good, he could not have avoided it.

7 Of a Monument built by one who was in poſſeſſion of the eſtate.

D. 5. 3. 50.

ONe who was lawfully poſſeſt of a deceaſed mans eſtate, built a Monument, which was required in the will: It was queſtioned, whether he, being removed, by an heyre that had better right, might recover his charges. *Papinian* anſwered, that in regard the will of a man deceaſed ought to be obſerved, if he expended no more, then was conveniently neceſſary, or was preſcribed by the Teſtator, he might either retaine ſo much in his hands, or recover it by way of ſuit, for although in ſtrictnes of Law, no man could bring an action againſt an heyre, for not building a monument, yet by the *Princes*, or *Pontificiall* power, he might be compelled thereunto.

TITLE

TITLE III.

Of Debt, and of common Contracts.

Debt is a Right unto which one is obliged for the doing, or performance of ſomething to another man, by reaſon of ſome contract, or agreement made with conſent of both parties; which Contract, is either Common, Speciall, or Reputed. Common contracts, are ſuch as are grounded upon the Law of Nations; whereof ſome are perfected by conſent or agreement only, as 1. Buying and ſelling, 2ly Letting and taking to hire, 3ly Partnerſhip, 4ly and Procuration. Others beſides conſent, require ſomething to be delivered; as 1. Borrowing and Lending, things conſiſting in quantity, 2ly Things in ſpecie, 3ly Committing and receiving things in truſt. 4ly Engaging, or leaving things in pawne.

1 *Of a Houſe burnt at the ſame time when it was bought and ſold.*

D. 18. 1. 57.

Paulus puts a caſe thus, I bought, ſaies he, a certain Houſe, when both the Seller and my ſelfe, were ignorant, that it was burnt, and relates, That *Nerva*, *Sabinus*, and *Caſſius* were of opinion, that

that nothing paſt in that bargaine, although the floore of the houſe remained, and that the mony paid, ought to be returned. But *Neratius* ſaies, That if a part of the houſe eſcaped the fire, it was conſiderable, what proportion the part ſtanding did beare, to that which is burnt; for if a greater part be conſumed with fire, he that bought it, is not bound to ſtand to the bargaine, but may recover what mony he gave for the houſe. But if only halfe of the houſe, or leſſe then halfe be burnt; then he ought to ſtand to the bargaine: ſo that an indifferent perſon judging, how much the value of the houſe is diminiſhed by the burning of the part thereof, he may have recompence accordingly.

2 *Of a Poole bought with ten foot about it.*

D. 18. 1. 69.

Rutilia Polla, bought a certain Lake, or Poole, together with the ground round about it, to the ſpace of ten foote. It was queſtioned, If the Lake happened by raine, or freſh waters falling into it, to be enlarged, ſo that the former ten foot round, were included therein, whether the next ten foot farther belonged unto her? *Proculus* anſwered, He was of opinion, That the ground which appeared about the Lake or Poole, when *Rutilia Polla* bought it, belonged unto her; and although the Lake increaſed, her right ought not to be extended to the ground farther round about it.

3 *Of*

3 *Of a ground ſold, to be meaſured within Thirty daies.*

D. 18. 1. 40.

Titius ſould a ground to *Sempronius*, which h eſteemed at a hundred Acres, with this co dition, That *Sempronius*, within Thirty dai might meaſure, and ſignify the juſt quantity there and if he did not ſignify the ſame within that tim he ſhould ſtand to the meaſure, at which it was eſt mated by *Titius*. *Sempronius* within the time limite ſignified as he conceived, ſomething wanting quantity, and was abated accordingly in the pric and after the thirty daies were expired, he havi a purpoſe to ſell it unto another man, meaſured t ſame, and then found the quantity thereof to b great deale leſſe, then he had ſignified before, It w queſtioned, whether he might require farther lowance from *Titius*, according to the later eſtim tion. *Paulus* anſwered, That it was conſiderable what manner, the condition was conceived, and e preſt, for if it were ſaid, he ſhould meaſure t ground, and ſignify the defect, if there were a within thirty daies: What he might ſignify afte wards, would doe him no good: but if it were greed, that the buyer within thirty daies ne ſhould meaſure the ground, and ſignify the defect the Seller (without limitation of time in that r ſpect,) although he ſignified ſome defect in t quantity, within thirty daies, he might demand lowance many years after, for as much as he ſhou make appeare to be more defective.

4

4 *Of Trees blown down, after the view, before the Sale.*

D. 18. 6. 9.

Seius having ſurvayed a ground, belonging to *Mævius*, whereon ſtood many trees, it happened, that before he bought it, ſome of thoſe trees, were blown downe by the Wind: It was queſtioned whether *Seius* had any right to thoſe trees? *Gaius* anſwered, That he had none, becauſe he bought them not, thoſe trees being ſevered from the ground, at the time of the Sale. But if *Mævius* knew ſo much, and did not acquaint *Seius*, who was ignorant therewith, he ought to give *Seius* ſatisfaction for ſo much as the trees were worth.

5 *Of Stone-quarries reſerved in a ground ſold.*

D. 18. 1. 77.

One ſelling a ground, excepted from the purchaſer, the ſtone quarries in that ground whereſoever: After a long time, ſome ſtone-quarries were diſcovered in that ground. *Tubero* was of opinion, that they belonged to him, that ſould the ground; *Labeo* ſaid, It was conſiderable, what was expreſt in the exception; If that were not cleare, he was of opinion, That the quarries newly found out, were not reſerv'd; becauſe no man is ſuppoſed to ſell, or reſerve out of his ſale, that which is not in being, and no quarries were held to be in being, but ſuch, as did appear; otherwiſe, the whole ground might fall under the condition of quarries, for it was poſſible that there might be quarries under the earth, throughout the whold ground: and *Javolenus* was of *Labeo* his opinion.

6 *Of Lands ſould diſpoſed of otherwiſe by the Prince.*

D. 21. 2. 11.

Lvcius Titius a Roman, bought Lands of a *Germa* beyond the *Rhyne*, and payed down part of t price; his heyre being afterwards ſued, for t remainder of the mony, pleaded, that Warre brea ing out in thoſe parts, thoſe Lands were taken aw by the Emperours decree, and given to his ow Souldiers, in recompence of their ſervice: It w queſtioned, whether that were ſufficient matter, t debarre the German from the remainder of t price. *Paulus* anſwered, That what happened, aft the bargaine was compleated, did not concerne t Seller, and therefore as the caſe was put, the reſt the price ought to be paid.

7 *Of a Price condition'd to be paid, once offered, afterwards neglected.*

D. 19. 1. 51.

Sempronius ſould a ground to *Mævius*, upon co dition, that he ſhould pay the price agreed for the ſame, on the firſt of *July* following; that time *Sempronius* was not ready to receive t mony, afterwards *Sempronins* being ready to recei it, *Mævius* was not provided to pay it: It was qu ſtioned whether *Sempronius* might not recede fro the bargaine, *Mævius* having failed to obſerve t condition. *Labeo* was of opinion, that he might, cauſe in the condition, it was intended, that whe ſoever *Mævius* ſhould faile in performance, *Semp nius* ſhould be free, which was held good, unl *Sempronius*, had practiſed ſome fraud in the buſine

8

8 *Of loſſe in Wines happening after ſale.*
D. 18. 6. 4.

A Merchant, ſould certain hogsheads of Wine to a Vintner, and appointed him a time to taſt them, at the time appointed, the Merchant being from home, the Vintner could not come at the Wines to taſt them; and when he came to receive them, the Wines were periſhed in goodneſſe: It was queſtioned, firſt whether the Vintner might not refuſe them, Secondly, if he were bound to receive them, whether the Merchant ought not, to give allowance, for ſo much as they prooved of leſſe value, then others of the ſame growth. *Vlpian* anſwered, that if the Vintner bought them conditionally, if at ſuch a time, upon taſt, he liked them, he might refuſe them; but if that be not ſo cleare, the bargaine may hold, but the hazard of the Wines failing in goodneſſe, ſhall belong to the Merchant, becauſe he was in fault, that they were not taſted.

9 *Of notice to be given concerning Wines bought.*
D. 18. 6. 15.

Titius ſould wine in Hogsheads, to *Sempronius*, which Wines, before they were taken away, grew fowle: It was queſtioned, who ſhould beare the loſſe? *Gaius* ſaid, That if *Titius* affirmed, they would continue good, he ought to give ſatisfaction to *Sempronius*; if he did not affirme, or undertake ſo much, whether *Sempronius* taſted them, or did not taſt them ſufficiently, he can blame no man ſo much as himſelfe. But it is true, that if *Titius* underſtood that they would not continue neat, untill the time, when they were to be removed, and

did not give notice thereof to *Sempronius*, he is li-
ble to him, for not giving him notice.

10 *Of a falſe eſtimation, made by one hired to build a houſe.*

D. 19. 2. 60. § 4.

Titius deſired an Artificer, to conſider, and cer-
tify him, for what charges, a building of ſuch
a faſhion, and proportion might be erected.
He returned his judgement, That it might be done
for two hundred pounds, whereupon *Titius* agreed
with him to doe it, and furniſht him before hand
with a hundred pounds: Afterwards, when fifty
pounds had been ſpent in the worke, he found that
it could not be finiſht under the charges of three
hundred pounds. It was queſtioned, whether he
were bound to ſuffer the Artificer to proceed there-
in: *Labeo* anſwered, If he proceeded after he was
forbidden, *Titius* might recover the fifty pounds
of the hundred, which was not laid out at the time
when he was forbidden.

11 *Of a Workman hired to erect a Work by great, yet received Wages by the day.*

D. 19. 2. 51. 11.

Javolenus puts this Caſe: I ſet out a worke to be
done by great, or for the whole, yet ſo that I was
to pay Wages every day; The worke when it
was finiſht was faulty, or unſufficiently done: It is
queſtioned, Whether I might bring my action a-
gainſt him. *Javolenus* anſwered. If you did ſo ſet
out your worke to be done, that the undertaker
ſhould make good to you the ſufficiency thereof,
although, it were agreed that for every daies work
he

he ſhould receive certain wages, yet if the worke be faulty or inſufficient, he that undertook it, is bound to make it good. For it makes no difference whether the agreement were for one intire ſumme for the whole, or ſomething to be paid for every daies work, if the finiſhing of the wh[illegible]ork belonged to the undertaker, and therefo[illegible] is liable to an action, if the work be defective or inſufficient, unleſſe the agreement, for paying wages by the day, were, that the owner might uſe his diſcretion in the riſing thereof. For in that caſe the undertaker is not bound for the ſufficiency thereof.

12 *Of Corne agreed to be received in ſtead of Rent.*

D. 19. 2. 19. § 3.

ONe who had let out his ground for a certain Rent, afterwards agreed with the Tenant, that in lieu of ſo much money he ſhould pay yearly a quantity of Corn; The Land-lord, as occaſion ſerved, refuſed to receive the Corn, and would not abate any thing out of his Rent in money: It was queſtioned, what remedy the Tenant might have. *Vlpian* ſaid, It was in the Land-lords power, according to the Leaſe, to ſue for his Rent in money; but that the Tenant had right to be releeved, for ſo much as he was prejudiced in paying money, if it were more eaſie for him to have paid it in Corn.

13 *Of the Tenants profits hindered by the Land-Lord.*
D. 19. 2. 30.

ONe took a Leaſe of a houſe, at twenty pound a yeare rent, and did let out Lodgings, to particular perſons, to the value of thirty pounds yearly, The Land-Lord before the time was expired, pretending the building was in decay, pulled down the houſe: It was queſtioned, what ſatisfaction was due to the Tenant? *Alfenus* anſwered, If the houſe were ſo ruinous, that there was neceſſity to take it downe, the Tenant ought to receive, during his time, as much as he gained from his Lodgings above the rent: but if there were no neceſſity, but the Land-Lord thought fit to have it built otherwiſe, according to his mind, he ought to give farther conſideration, for ſo much as it might any way concerne the Tenant, that the Lodgers had not been removed.

14 *Of the Tenants profits hindred, otherwaies then by the Land-Lord.*

D. 19. 2. 33.

IF a ground which I hired from you, for a certain time at an yearly rent, be confiſcated, or ſeſed to be imployed for ſome publique uſe; *Africanus* ſaies, you are liable to me, in regard I cannot make uſe thereof, although it be not in your power to make it good. For if you ſhall ſell a ground unto me, and before I receive the free poſſeſſion thereof it be ſeized for the publique ſervice, you are anſwerable for the ſale; which is to be underſtood, ſo farre as to returne the price or mony which I gave for it, not for what benefit I might have made thereof, if

caſe I had had the free or cleare poſſeſſion thereof: & in like manner, I am of opinion, that concerning ground which is let out for rent, it ought to be obſerved, that the rent which I have already paied, ſhould be reſtored, for ſo much time as I could not enjoy the ſame, and that you are liable for no more: For if your Tenant be hindered by you, or any other, whom you could have reſt .ned, you ſhall make good to him what it might c ncerne him, if he had enjoyed it; that is the profit ich he might have made thereby. But if he be h .. lered by one whoſe greatnes, or power, you could not prevent, you are bound to no more then to reſtore, or remitt his rent.

15 *Of unneceſſary Charges laid out by a Partner.*
D. 3. 5. 27.

Itius and *Seius* two Brothers, one being of full age, the other a Minor, had a Country Farme, held in Common between them: the elder brother built thereon a larger Houſe, with faire Galleries, and when the younger came to age, and the ground was to be divided betwixt them, he demanded allowance for the charges he had expended, in building thereupon. It was queſtioned, whether the younger brother were bound to allow any. *Modeſtinus* anſwered, That what charges were laid out unneceſſarily, and for his own pleaſure, he ought not to be allowed.

16 *Of Losses befalling to one, of two partners.*

D. 17. 2. 52. § 4.

TWo Partners driving a joint Trade in certaine commodities, One of them took a journey to buy things conducing to their Trade, and fell amongst theeves, which rob'd him of his money and cloaths, and wounded his Servant: It was questioned, how farre the other Partner ought to contribute to the losse? *Julianus* said, The other Partner ought to be joyned, and bear his part in the losse, not onely in the money, but also of the goods, and other things, which his Partner had not taken with him, but for the advancing of their common Trade, and also of the charges which were sustained, in providing Physicians to cure the Servant wounded, which is to be observed: Sayes he, if Goods suffer shipwrack which could not otherwise be conveyed but by Sea, for as the gain, so the losse must be common, if it happened not by the fault of one of the Partners.

17 *Of a reputed Heir joyned with a surviving Partner,*

D. 17. 2. 62.

Titius and *Seius* being Partners, and having a joint stock, *Titius* died, and *Mævius* being reputed his heir, together with *Seius*, Sold the stock, and the proceed thereof was divided between them. Afterwards it appeared, that *Sempronius* was the true heir to *Titius*: It was questioned, whether *Sempronius* could recover any thing from *Mævius*, the

the ſurviving partner. *Neratius* and *Ariſto* were of opinion, That he could not, becauſe *Mævius* received no more, then what his own part was ſold for; neither makes it any difference, whether either of them ſold his ſeverall part, or both joyned in the ſale of the whole: And whatſoever *Sempronius* ſhall recover from *Mævius* the reputed heir; he ſhall enjoy it wholly to himſelf, without rendring any part to *Seius*.

18 *Of Equality to be kept in diviſion amongſt Partners.*

D. 17. 2. 63.

Lucius, *Gaius*, and *Attius*, three Partners, dealing in the ſame Trade jointly, and ſome difference ariſing amongſt them: Firſt *Attius* ſued *Lucius*, and had his entire third part adjudged unto him. Afterwards *Gaius* commenced the like ſute againſt *Lucius* for a partition, but there remained not ſo much as to make up his third part, equall to that which *Attius* had received: It was queſtioned whether *Gaius* might ſue *Attius*, to returne ſomething of what he had received, to make their parts equall. It was reſolved by *Vlpian*, that he might: Becauſe it was unjuſt, that out of the ſame Partnerſhip one ſhould gain or keep more then another, which opinion is grounded on Equity.

19 *Of*

19 *Of one Requeſting another, to Buy ſomething, whereof he might have a ſhare, buying the whole himſelfe.*

D. 17. 2. 52.

MÆvius and *Gaius* had two grounds, the one adjoyning to the other, and *Lucius Titius* a third ground, abutting upon thoſe two; *Mævius* underſtanding that the third ground was to be ſould, requeſted *Gaius* to buy the ſame, to the end that the part abutting upon his ground, might be annexed thereunto (whereunto it ſeems *Gaius* agreed) Afterwards *Mævius*, without acquainting *Gaius* therewith, bought the whole ground for his own uſe: It was queſtioned, whether *Gaius* might not ſue him to communicate to him a part thereof? *Julianus* anſwered, It was a doubtfull buſineſſe. For if it were deſired only, that *Gaius* ſhould buy the ground of *Lucius Titius*, and ſuffer *Mævius* to have part thereof, *Gaius* had no ground of action against *Mævius* for purchaſing the whole. But if it were agreed, that it ſhould be done, as a common buſineſſe, *Gaius* might have his remedy, that *Mævius* reſerving one part to himſelfe, ſhould convey the other unto him.

20 *Of undertaking to ſave one Harmeleſſe during another mans life.*

D. 17. 1. 59. § 5.

LVcius Titius by his letter, gave order to *Seius* to lend a hundred pounds, to *Blæſus Severus* his kinſman, and bound himſelfe, to ſave him indamnified, both for the mony, and intereſt thereof as long as *Blæſus Severus* ſhould live: *Seius* having

lent the mony to *Blæſus Severus*, often times demanded the ſame of *Lucius Titius*, and at length *Blæſus Severus* died. It was queſtioned, whether *Lucius Titius* ſtood bound after his death. *Paulus* anſwered, That the obligation, which aroſe from his order, became perpetuall, being not ſatisfied upon demand; although in the following words of the order, it were expreſt that he would ſave him harmleſſe as long as *Blæſus Severus* lived.

21 *Of Vndertaking as much in effect as was deſired.*

D. 17. 1. 62.

LVcius Titius wrote to *Gaius Seius*, deſiring that he would be bound with *Publius Mævius*, to *Sempronius*, for an hundred pounds, and engaged himſelfe, that if *Publius Mævius* failed, he would make it good: *Gaius Seius* was not bound with *Publius Mævius*, but in ſtead thereof, gave order to *Sempronius* to lend ſo much, and afterwards being ſued paid the ſame: It was queſtioned, whether he might have remedy againſt *Lucius Titius*, upon his Letter, not having obſerved his requeſt therein? *Scævola* anſwered, That he might, having done the ſame in effect.

22 *Of Power not to be extended to deceit.*

D. 17. 1. 60. § 4.

LVcius Titius wrote unto *Seius*, his brothers ſonne, That beyond the intereſt he had in him by nature, he gave him full power by this his Letter, as maſter of his eſtate, to order, and diſpoſe thereof, as he ſhould think fit, promiſing to allow and ratify the ſame. It was queſtioned, whether if he ſhould diſpoſe of any thing fraudulently, or to the

the prejudice of the eſtate, the power were ſufficient? *Scævola* anſwered, That the power was very large, but did not extend to any thing which might be done deceitfully.

23 *Of ones Acting by a Letter falſified.*

D. 50 1. 36.

Titius reſiding Student at *Rome*, the Magiſtrates of *Oſtia*, where his friends dwelt, directed a Letter unto him, with an Order of the Town inclоſed, to be preſented to the Emperour; for which ſervice he was to receive a reward. But the Meſſenger who undertook the delivery of the Letter, gave it to *Lucius*, who was there likewiſe, upon ſome occaſion of buſineſſe of his owne, he raſing out the name of *Titius* inſerted his owne; and according to the directions of the Magiſtrates of *Oſtia*, delivered their Order to the Emperour: It was queſtioned whether of them ought to receive the reward? and what he deſerved, who miſdelivered the Letter and he who raſing out the right inſerted a falſe name? *Modeſtinus* not weighing the latter, anſwered to the former, That in truth *Titius* could not demand the reward, but he who delivered the Order although he had falſified the name.

24 *Of Money delivered as Guift, received as Loan.*

D. 12. 1. 18.

ONe delivered a ſumme of money to another with an intent to give it freely, the other received it not otherwiſe then by way of Loan. It was queſtioned what the buſineſſe amounted unto.

unto? *Julianus* ſaid, it was no free guift, and *Paulus* ſaid, it was no Loan, neither was the property of the money altered, becauſe it was received in a way different from that, wherein the moneys were delivered, and therefore if the moneys were ſpent, by Law there lay an action at any time to recover the ſame, but he that was ſued, had likewiſe the benefit of a juſt exception, to wit, that the moneys were ſpent, according to the minde and meaning of him, who delivered the ſame.

25 *Of Money given to be Lent to him who gave it.*

D. 12. 1. 20.

ONe gave money to another to the intent, that he who received it, ſhould preſently lend the ſame again to him who gave it, which was done accordingly: It was queſtioned whether this money were given or lent? *Julianus* ſaid, That in this caſe there could be no free guift, nor no Loan; no guift, becauſe the money was not given with an intent that it ſhould remain with him that received it, and that there could be no Loan becauſe it was done in purſuit of an agreement to free him, who firſt received it, not to oblige him to whom it was returned. But theſe things, Sayes he, are ſo, if they be underſtood according to the nicety, and ſubtilty of the words uſed; but by a fairer and a more reaſonable conſtruction, the guift and the loan were both of force.

26 *Of Mony ordered to be lent by one, received as lent from another.*

D. 12. 1. 32.

Seius requested *Gaius* and *Sempronius* to lend him a ſumme of Mony; *Sempronius* gave order, to a debtor of his, who owed him ſo much, to deliver it. *Seius* received it, and undertook the payment thereof, as if that debtor had been engaged to *Gaius*, and had lent the mony in his name. It was queſtioned, whether *Seius* were bound to *Sempronius*: and it is doubted, becauſe *Seius* did not undertake any thing, as to him. But it was reſolved by *Celſus*, that he rather ſtood bound to *Sempronius* not that he lent the mony, for that could not be unles both parties had ſo agreed, but becauſe it ſtood with *Equity*, and honeſty, that the mony which came from *Sempronius*, ſhould be repaied to him againe.

27 *Of Plate delivered to be ſould, inſtead of monies deſired to be borrowed.*

D. 12. 1. 11.

Titius deſired to borrow Ten pounds of *Mævius*, who having not ſo much monies to ſpare, delivered to him a Silver Plate worth ſo much, and gave him power to ſell it, and to make uſe of the Mony. It is not doubted, but that if *Titius* had ſould the ſame, he muſt have become creditor for the Mony: but if the Plate were loſt, before *Titius* could ſell it, without any fault of his, It was queſtioned, whether *Mævius* or *Titius* ſhould bear the loſſe. *Vlpian* ſaies *Nerva* diſtinguiſht in the caſe, and was of opinion, That if *Mævius* formerly had kept that plate

of Silver, with purpoſe to ſell it, as his own occaſions ſhould require, if it were loſt, the danger belonged to him, as it muſt have done, if he had delivered it to another man, to ſell for him. But if he formerly had, and kept it, not for any ſuch purpoſe, but was contented, that it ſhould then be ſould, only that *Titius* might make uſe of the mony, the loſſe ought to fall upon *Titius*; eſpecially if it were lent, without condition of intereſt, or exſpectation of gaine thereby.

28 *Of a Horſe lent, failing in his Journey.*
D. 13. 6. 23.

ONe who had lent his Horſe to another, to take a journey to a certain place, the Horſe failing, would have recovered ſatisfaction of him, to whom it was lent. *Pomponius* told him, That if the Horſe were tyred, or failed without his fault, to whom it was lent, he was not liable for any thing, becauſe he that lent it, for ſuch a journey, was in fault, the Horſe being not able to performe the ſame.

29 *Of a Thing* Lent *to two, and loſt.*
D. 13. 6. 5. § 15.

ONe lent a Waggon, at the ſame time to two ſeverall perſons, which was loſt: It was queſtioned, whether each of them were liable for the whole, or both of them, for their ſeverall parts. *Vlpian* anſwered, That although the Waggon were not lent by parts, yet in effect, the uſe thereof, was intended to be made by parts, becauſe one of them to whom it was lent, could not make uſe of the whole alone, but in truth it being gratis or freely done,

each

each of them was bound, not onely to uſe no fra nor fault in the employment thereof, but alſo to all diligence in keeping the ſame, and therefore e of them alone was bound to make good the whol but if one upon ſute had made ſatisfaction for t whole, the other was freed.

30 *Of a Thing Lent and Loſt, received by the Owner.*

D. 13. 6. 17. § 21.

ONe loſt a horſe which he had borrowed, a paid the price thereof, the owner afterwar received his horſe again: It was queſtione what was due to him who had paid for it? *La* ſaid, He might recover by ſuit either the thi which he had paid for, or the price which he ga for it. It was further queſtioned, If he who le ſomething to another ſtole away the ſame, and h ſuit recovered the value, whether the theft being d covered, he might not be ſued as a thief? *Africa* anſwered, That he could be ſued as a theef, for t king his own, but he might be compelled to retur the horſe to him who had paid for it.

31 *Of Intereſt of money depoſited, undertaken to be paid.*

D. 16. 3. 28.

Q*Vintius Cecilius* wrote to *Paccius* in this ma ner: Theſe are to ſignifie to you, that the ty pounds, which you deſired ſhould be k with me, are put to mine account, which I ſhall b carefull to ſee employed, that you may receive in

ſeſt for the ſame: It was queſtioned, whether if no intereſt were received, it might be recovered upon this Letter? *Scævola* anſwered, That the intereſt ought to be paid, although none were received by *Cecilius*, nor the moneys were any waies employed to his uſe.

32 *Of fair and conſcionable Dealing, touching things depoſited, in ſeverall reſpects.*
D. 16. 3. 31.

AS in other Contracts, ſo eſpecially in things depoſited, or left in truſt (ſaith *Tryphoninus*) conſcionable or fair dealing is required, which conſcionable or fair dealing ought to be regulated by the greateſt *Equity* that may be: But he makes a queſtion whether that *Equity* ought to be eſtimated, meerly according to the Law of Nations, as betwixt man and man? Or whether reſpect alſo to the civill Law, made for the good of the Common-wealth, ought not to be had? And by way of inſtance ſuppoſes, That one who was guilty of ſome Capitall crime, left in truſt with his friends a hundred pounds, and was afterwards convicted, and his goods adiudged to be confiſcated; In which caſe, How ſhall the friend, truſted with the money, acquit himſelfe? He ſayes, if the Law of Nature and Nations only be looked upon, the money is to be reſtored to him, who left it in truſt: But if the civill law or the law of the Countrey be conſidered, it ſhall rather be brought into the publique Treaſury, becauſe it is juſt, that he who hath publickly offended, for example, and deterring of others, ſhould be reduced to penury, and deprived of his goods. He makes another Enquiry: Whether this faire dealing and Equity ought to be conſidered in reſpect

of thoſe perſons only, betwixt whom the contract for reſtoring what was left, was made, or whether regard ſhould be likewiſe had to other perſons, whom the buſineſſe doth concern; As for example, A Theef or Robber took away a pack of goods from an honeſt man, called *Titius*, and left the ſame in truſt with *Seius*, who knew nothing of the theft or robbery; whether ought *Seius* afterwards underſtanding the truth, to reſtore the goods to the theef or robber, or to *Titius*? He ſayes, If regard be had to the perſons of him who left, and the other who received the goods in truſt, It ſtands with fair dealing and equity, that he who depoſited the goods ſhould receive the ſame, but that, If Equity that be regarded, which reſults out of the whole buſineſſe, and relates to all the perſons that are concerned therein: they ought to be reſtored to *Titius*, from whom they were wrongfully taken away; and thereupon he concludes, That that is beſt juſtice which ſo renders to every man his own, that it be not diverted from him, who hath a better title thereunto; and addes, That if *Titius* come not to demaund his goods, the evill getting thereof ſhall not hinder, but that he, who left them in truſt, ought again to receive the ſame.

33 *Of a Houſe engag'd, burnt and rebuilt.*

D. 20. 1. 29. § 2.

A Houſe being engaged for debt, was afterwards burnt down, and *Ludicius Titius* buying the ground whereon it ſtood, built another houſe thereon. It was queſtioned, Whether the Creditor had any right to that houſe? *Paulus* anſwered, That the right was not extinct, and what was built on the ground followed the condition thereof; but he that

that built the houſe, being ignorant of the engagement, was not bound to render it to the Creditor, unleſſe he were ſatisfied for the charges in building; in regard by his means the Creditors right had been improved.

34 *Of a Shop engaged for moneys borrowed.*

D. 20. 1. 54.

A Mercer, being indebted for a conſiderable ſum of money, engaged his Shop by way of ſecurity for the ſame: It was queſtioned firſt, whether the Wares in the Shop were engaged, Secondly, whether the preſent wares or any other, that ſhould be brought into their room, might be ſued for as liable for the debt? *Scævola* anſwered, Firſt, That the wares in the Shop were included, for otherwiſe the Security had been to no purpoſe; Secondly, That although the wares which were in the Shop were at ſeverall times all ſold, and others brought in their room, yet all that at the death of the Mercer were found in his Shop, were liable, as engaged for the debt.

35 *Of Cattell pawn'd, and diſpoſed of by the Heir.*

D. 20. 1. 26. § 2.

Lvcius Titius borrowing money engaged, by way of Security for the ſame, certain grounds, and the ſtock of Cattell going thereon; He dying, his heirs divided the grounds betwixt them, and the ſtock of Cattell being worn out, put other Cattell in thoſe grounds, the money being unpaid, the Creditor entred on the grounds, and diſtrain'd the Cattell: It was queſtioned, whether he had any

right to the Cattell, which were afterwards found on the ground? *Modeſtinus* anſwered, That if they were not the ſame Cattell, which were firſt engaged, nor proceeding from them, the Creditor had no right unto t[illegible] anſwe[illegible]

36 *Of Cattell* [illegible], *before they were put into the L*[illegible]*-lords ground.*

D. 26. 4. 11. § 2.

THe Tenant greed with the Land-lord, that whatſoever Cattell he ſhould put into his ground, they ſhould be engaged for the rent, and having a flock of ſheepe, he borrowed a ſumme of mony, and obliged them for paiment thereof, and afterwards he put them into his ground: It was queſtioned, whether of the two, had better right for ſatisfaction from the ſheep? *Gaius* anſwered, That the later, to whom they were engaged ſimply, had better right then the former, to whom they were to become engaged, when they were to be put into his ground; which happened after the other engagement.

37 *Of Goods profer'd but ſold before engagement.*

D. 20. 3. 4.

Titius having a deſire, to borrow mony of *Mævius*, promiſed ſecurity, and deſigned, or ſhewed ſome goods, which he would engage; but before he received the mony, he alienated ſome of thoſe goods: It was queſtioned, whether the goods alienated, were liable to *Mævius* for his debt? *Paulus* anſwered, after the ſecurity offered, or promiſed, it was in the power of *Titius*, not to borrow, and of *Mævius*, not to lend the mony, and that the contract, for

for engaging the goods, was to be understood of the goods at the time, when mony was lent, and therefore, it was to be considered [illegible]ly, what goods were his at that time.

38 *Of things engaged to one* [illegible]ntr[illegible]*t due at a day, and before that day,* [illegible] *to another, for read* [illegible]*v.*

D. 20. 4. 3.

ONe who hired a bathing roome, for a terme, to commence from the *Kalends* of *May* following, agreed, that his Bond-man *Eros*, should be engaged to the owner a security, untill his rent were paid. The same man before the *Kalends of* May, borrowing Mony of another man, gave his Bondman *Eros* pledge for the same: It was questioned whether of the two had better right to the Bondman? *Africanus* answered, That he who rented out the Bathing roome, had the better right, for although nothing were due to him, when the Bondman was engaged to the other Creditor, who lent the mony, yet becauſe, before that time, he had a right to the Bondman, which could not be taken from him, without his consent, his interest was better then the others.

39 *Of a Ground sold upon condition, and then engaged, recovered, for not performance of the condition.*

D. 20. 1. 31.

ONe, who owed an yearly tribute to the *Commonwealth*, sold a ground, upon condition, that if the Tribute were unpaid, he the former owner might resume the same: Afterwards, he that bought it, engaged the ground unto another for a sum

right to the Cattell, which were afterwards found on the ground? *Modeſtinus* anſwered, That if they were not the ſame Cattell, which were firſt engaged, nor proceeding from them, the Creditor had no right unto t[illegible]

anſwe[illegible]

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THe Tenant greed with the Land-lord, that whatſoever Cattell he ſhould put into his ground, they ſhould be engaged for the rent, and having a flock of ſheepe, he borrowed a ſumme of mony, and obliged them for paiment thereof, and afterwards he put them into his ground: It was queſtioned, whether of the two, had better right for ſatisfaction from the ſheep? *Gaius* anſwered, That the later, to whom they were engaged ſimply, had better right then the former, to whom they were to become engaged, when they were to be put into his ground; which happened after the other engagement.

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for

for engaging the goods, was to be understood of the goods at the time, when mony was lent, and therefore, it was to be considered [redacted]v, what goods were his at that time.

38 *Of things engaged to one [redacted]t due at a day, and before that day, [redacted] to another, for read[redacted]v.*

D. 20. 4. 3.

ONe who hired a bathing roome, for a terme, to commence from the *Kalends* of *May* following, agreed, that his Bond-man *Eros*, should be engaged to the owner a security, untill his rent were paid. The same man before the *Kalends of* May, borrowing Mony of another man, gave his Bondman *Eros* pledge for the same: It was questioned whether of the two had better right to the Bondman? *Africanus* answered, That he who rented out the Bathing roome, had the better right, for although nothing were due to him, when the Bondman was engaged to the other Creditor, who lent the mony, yet because, before that time, he had a right to the Bondman, which could not be taken from him, without his consent, his interest was better then the others.

39 *Of a Ground sold upon condition, and then engaged, recovered, for not performance of the condition.*

D. 20. 1. 31.

ONe, who owed an yearly tribute to the *Commonwealth*, sold a ground, upon condition, that if the Tribute were unpaid, he the former owner might resume the same: Afterwards, he that bought it, engaged the groūd unto another for a sum

money, and neither the Buyer nor the Creditor, to whom it was engaged, paying the Tribute: It was decreed, that the first owner might resume the ground: It was then upon questioned, whether any right remained to the Creditor to whom it was engaged? *Scævola* answered, That the first owner justly resuming his right, the engagement vanisht, and became of no effect.

40 *Of a Ground engaged to three persons, whereof the last redeemed it from the first,*
D. 20. 4. 12. §. 8.

Lucius first borrowing money of *Titius*, agreed with him, that a certaine ground should stand engaged for payment thereof. He afterwards borrowed money of *Mævius*, and agreed with him, that when that ground was disengaged from *Titius*, it should be liable to him for his money. In the third place, *Sempronius* lent money to *Lucius*, to pay *Titius*, and it was agreed, that the same ground should be engaged to him in the room, or place of *Titius*; It was questioned, Whether *Mævius* who lent money in the second place, or *Sempronius* who came in the third, had better interest to the ground? *Martianus* was of opnion, that *Sempronius*, with whom it was agreed, that he should be in the room or place of *Titius* had the better title.

SECT.

SECT. II.

Of ſpeciall Contracts.

Speciall Contracts are ſuch, wherein according to the Law and Cuſtome of the Countrey, ſomething is added, beſides the nature of a common contract, by ſpeciall Covenant or agreement: or when ſomething is promiſed in ſolemn and formall words or writing; or undertaken by a ſurety on anothers behalf.

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1 *Of a Sale covenanted to be be void, if the price be not paid at a day.*

D. 18. 3. 8.

Poſthumia ſold certain grounds to *Gaius Seius*, and took five pounds of him by way of earneſt, and appointed a certain time, for payment of the reſt of the money; and covenanted with him, That if he ſhould fail of payment at the time appointed, he ſhould looſe his earneſt, and the ground ſhould be unſold: *Gaius Seius* at the time appointed brought his money ſealed in baggs, and before witneſſes, offered himſelfe ready to pay the ſame. But *Poſthumia* did not appear that time: the next day, he was required by an officer of the publique Treaſury, not to pay any money

ny to *Posthumia*, untill he had paid his publique debt? It was questioned, whether *Posthumia* might not resume her right in the grounds, according to the Covenant, the mony being unpaid? *Scævola* answered, that as the case was proposed, *Gaius Seius* had done nothing against the covenant or agreement.

2 *Of a Sale covenanted to be void, if within a set time more were offered.*
D. 18. 2. 17.

ONe who had two Bondmen, sold them, to two severall persons, for ten pounds a peece, in case no man should offer, or give more, within ten daies, within which time, one offered for both these Bondmen thirty pounds: It was questioned, whether, and how far the former sale were voyd? *Julianus* answered, That it was considerable, whether he would give twenty pounds for one of them, and ten pounds for the other, or whether he would give fifteen pounds for each of them; for if the former were intended, then the sale was voyd, touching him, for whom twenty pound was offered; if the latter, the sale was voyd for both, and the second Chapman, was to be admitted to the bargaine; but if it were uncertaine, for which, or in what respect, the greater summe was offered, there was no sufficient ground, why the former bargaine should not hold good.

3 *Of part of a Ground, warranted, recovered.*
D. 21. 2. 45.

ONe selling a ground, shewed the bounds thereof, and warranted it to be an hundred acres, of which if any were evicted, or recovered, it was to be at his perill. After the sale, part of the ground shewed by him, was recovered by another man, yet that which remained, amounted to an hundred acres: It was questioned, whether the seller, were liable at his perill for that which was recovered? *Africanus* answered, That he was liable, in regard that Land which was recovered, might be better then any part of that which remained.

4 *Of two Horses sold, one recovered from the Buyer.*
D. 21. 2. 49.

ONe bought two Horses for five pounds a peice; one of them being recovered from him, he was offered ten pounds for the other: It was questioned, Whether according to the custome, he were bound to pay the mony, and interest for that which was recovered? *Africanus* answered, that he was lyable, although he had sold them both together for ten pounds.

5 *Of*

5 *Of a Ground ſold, whereof a third perſon recovered part, and part, was loſt by the Sea.*

D. 21. 2. 64.

ONe ſould and gave poſſeſſion of a ground, containing a thouſand acres, whereof, the ſea afterwards breaking in, two hundred were loſt, and *Titius* a third perſon, who had right to a fourth part, ſued for two hundred and fifty acres, but recovered only two hundred acres: It was queſtioned, what he, who had covenanted to make double ſatisfaction to the buyer, for what ſhould be recovered from him, was liable unto? *Papinian* anſwered, That he was liable only for a fifth part, that is, two hundred acres, not for the fourth, which was two hundred and fifty, although *Titius* had right to ſo much; for that which was loſt by the ſeller he was not bound to make good; but if the whole ground, after the ſea had broken in, had been recovered by *Titius*, in ſtrictneſſe of Law, nothing of what was covenanted for, ſhould have been abated unto the ſeller, no more then if after a horſe is ſold, he grow lean before he be recovered by another man. As on the other ſide, If after the ſale, a thing be improved in value, and then recovered, the obligation for ſatisfaction in caſe of eviction, is ſtill the ſame, as it was at the time of the ſale, ſo that, if by receding or falling back of the ſea, two acres of land accrue unto the ground, and of a thouſand it become twelve hundred acres, and the fifth part of the whole be recovered, ſatisfaction ſhall be given, only for the two hundred acres, which were the fifth part of the thouſand, at the time of the ſale; becauſe the recovery of part of the two hundred, which accrued afterwards by the falling away

of the ſea, belongs not to him who made the ſale. It is further queſtioned, If after the ſale of Lands or Grounds containing a thouſand acres, two hundred acres be loſt on the one ſide, by breaking in of the ſea, and on the other ſide, two hundred be gained, by falling back of the ſea, and then a fifth part indiſtinctly be recovered, for how much the ſeller ſhall be liable to make ſatisfaction: *Papinian* anſwered, he ſhall be liable neither for the fifth, nor the fourth part, of a thouſand acres, but as if, of eight hundred, a hundred and ſixty only had been recovered, for the other fourty acres which were loſt in the whole, by the breaking in of the ſea, are recompenced by what was gained on the other ſide.

6 *Of* Land Let, *Covenanted to be till'd.*

D. 19. 2. 53.

ONe let Ground to another for ſeven years, for three pounds yearly rent, and covenanted, that if the Ground were not tilled and manured, the Land-lord might let the ſame to another man; and if it happened to be for a leſſer ſumme, the former Tenant ſhould make good the reſt. The Ground after a year being not tilled, the Land-lord let the ſame to a third perſon at four pounds yearly, for the remainder of the term: It was queſtioned, whether the Land-lord ought not to allow the former Tenant the ſurpluſage, above the three pounds yearly? *Julianus* ſaid, In ſuch Covenants it is to be conſidered what was agreed betwixt the parties. But in the buſineſſes in queſtion, in regard nothing was provided, in caſe the ground were let for more, it ſeems the covenant was inſerted in favour of the Land-lord only.

7 *Of*

7 *Of Covenants unperform'd on both sides.*

D. 18. 5. 10.

Titus Cornelius, bought certain grounds, of *Junius Blæsus*; and having cause to suspect, that *Numeria*, and *Sempronia* might trouble him, by suing for the same, covenanted with *Junius Blæsus*, that part of the mony, should be detained in his own hands untill a sufficient surety were given, to save him harmles; afterwards *Junius Blæsus*, added another covenant, that if by a certain day, the whole price were not paid, the grounds should remain to him as unsold. In the mean time *Numeria* commencing a suit concerning those grounds, *Blæsus* obtained sentence against her, and then compounded with *Sempronia*: so that *Titus Cornelius* had no cause left to doubt his title: It was questioned, no surety being given by *Blæsus*, and the mony, at the time appointed being unpaid by *Cornelius*, whether the sale were void? *Scævola* answered, That if it were covenanted, that a surety should be given before the mony were paid, and that was not done, there being no fault in *Titus Cornelius*, the later covenant ought not to be insisted on, to make the sale voyd.

8 *Of a Covenant to doe no dammage to another mans house.*

D. 39. 2. 25. & 26.

Titius, whose house owed no service to the house of *Gaius* his neighbour, gave him bond, that he would doe him no wrong or dammage, in building

or contriving any thing in his houſe: It was queſtioned, if *Titius* built his houſe higher, whereby the lights of *Gaius* his houſe were darkned, or made a well, whereby a ſpring of water, was drawn from the well of *Gaius*, whether he might ſue *Titius* upon the bond? *Proculus* anſwered, That *Gaius* had no right to ſue *Titius*, upon that occaſion; for he is not held to ſuffer dammage, who is hindered from that benefite, which he formerly enjoyed; and *Trebatius* gives this reaſon, becauſe it cannot be imputed as a wrong, when one does no more, then it is lawfull for him to doe.

9 *Of a Covenant to pay mony, if ſuch or ſuch a thing be not done.*

D. 34. 5. 13. § 2.

LVcius bequeathed to *Titius* a houſe, and a ground, and made *Mævius* his heyre; *Titius* covenanted with *Mævius*, that if *Mævius* did not convey unto him, ſuch a certain houſe, or ſuch a certain ground, that *Mævius* ſhould pay unto him, a hundred pounds: At the time appointed, *Mævius* conveyed to *Lucius* the houſe agreed upon, but not the ground: It was queſtioned, whether he were liable to pay the hundred pounds, *Julianus* ſaid, That he was liable to pay the hundred pounds, and that it was all one, whether the one or the other were unperformed. Indeed it were more evident, when divers things are propounded, all which we would have done, if we covenant for a penalty, in caſe any of thoſe things ſhall be omitted; and if diverſe things be propounded

propounded, whereof the performance of one is sufficient, to covenant, if none of those things shall be done, you shall pay a hundred pounds.

10 *Of Money due upon default of condition, not to be required untill the time of performance.*
D. 45. 1. 8.

LVcius Titius covenanted with *Sempronius*, that if he did not give him *Sticchus* his bondman, on the first of the Kalends of *March*, he should pay him ten pounds; *Stichus* the bondman died in the mean time, long before the Kalends of *March*: It was questioned, whether *Sempronius* might not then presently sue for the ten pounds; in regard it could not be possible that *Lucius Titius* should give him *Stichus* at the time appointed: *Sabinus* and *Proculus* answered, That he had no right to sue before the Kalends of March: which *Paulus* likewise approves; because the the whole obligation hath both a condition, and a certaine day for performance: and although, as to the condition, it was in force, and the money became due, yet the day of payment of the money was not then come.

11 *Of a Covenant to binde one to Marriage, under a forfeiture.*
D. 45. 1. 134.

TItia having a son, who was a Batchelor, married with *Gaius Seius*, who had a young daughter unmarried: At the time of their Marriage, it was agreed between them, that the sonne and the daughter should contract espousalls together, and a Covenant was drawn up in writing, that on that side

ty part, whence any impediment ſhould happen, to diſappoint the compleating of the marriage, an hundred pounds ſhould be forfeited to the other party: Afterwards *Gaius Seius* dying, his daughter refuſed to be married, to the ſonne of *Titia:* It was queſtioned whether the hundred pounds, covenanted to be forfeited, might be recovered from the heirs of *Gaius Seius: Scævola* anſwered, That if *Titia* brought her action upon that Covenant, the heirs of *Gaius Seius* might take exception unto the unlawfulneſſe thereof: Becauſe it was alwaies held a diſhoneſt courſe, to entangle peſons, by danger of forfeitures, to contract either Eſpouſals or Marriages.

12 *Of a Surety, not being liable, when and where the principall debtor is not.*

D. 46. 1. 49.

Sempronius borrowed money of *Mævius*, to be repaid by him at *Capua*, and *Cornelius* as a ſurety, bound himſelf for the performance thereof; *Mævius* underſtanding that *Sempronius* was arrived at *Capua*, & in that reſpect liable to his action there, demanded payment of the Money from *Cornelius* the ſurety, then remaining at *Rome*. *Papinian* being conſulted thereupon, anſwered, That although the action did lie at that time againſt *Sempronius*, then being at *Capua*, yet *Cornelius* the ſurety was no more liable to the action, then if he himſelf being at *Cappua*, had undertaken for the payment, when *Sempronius* the principall debtour was not yet arrived there; for in that caſe it was certain, the principall could not have been ſued, there being a Tacit allowance of time for payment, in a remote place; and it were hard the ſurety

ſurety ſhould be ſued, when the party principall was not liable to an action; and therefore he concludes, that the tacit allowance of time for paiment, is to be granted to both; and that they who are of another opinion, would contrary to the rule of Law, make the condition of the ſurety worſe, then of the principall Debtor.

13 *Of Diſengaging the Security, before the debt be paid.*

D. 17. 1. 38.

Lvcius Titius, at the requeſt of *Mævius* his naturall ſonne, gave way, that he ſhould engage for a debt, a houſe, which was common to them both, without any intention of putting away his right therein: Afterwards *Mævius* dying, and leaving a Daughter under age, her Tutors began to queſtion *Lucius Titius*, for ſome matters before the Judge; He deſired that his intereſt in the houſe, might be freed, from *Mævius* their fathers engagement: It was queſtioned, whether the Judge might take order to free it? *Marcellus* was of opinion, that the Judge might proceed therein, taking into his conſideration, the condition of the Debtors, the agreement had betwixt them, and the length of the time, wherein the houſe had been engaged; which buſineſſe, he ſaies, is not unlike that of a ſurety, which ofren falls out, when he ſues to be diſcharged, before the debt be paid, for he ought not alwaies to ſtand expecting, when the principall Debtor will take order for payment, or the Creditor ſue, and recover his mony, if the principall debtor be a long time negligent, and the ſurety himſelfe prove leſſe able to ſatisfy; which if he had in due time been enforced unto, he might have had ſome remedy a-

gainſt

ginſt him, for whom he was intreated to become engaged.

SECT. III.

Of Reputed Contracts.

Reputed contracts are, when, without mutuall or expres conſent on both ſides, one becomes obliged to another, by buſineſſe voluntarily acted, or done, or being imploy'd in ſome private charge or publique office.

1 *Of a Grandmother maintaining her Niece in Minority.*

D. 3. 5. 34.

NEſennius Apollinarius puts a caſe to *Paulus*, as followeth, The Grandmother took upon her the managing of the Nieces eſtate; both being dead, the heyres of the Grandmother, being ſued, by the heyres of the Niece, for goods which belonged unto her, demanded allowance, for the Nieces diet, for which the Grandmother, ſome years had been at charge. It was anſwered by the heires of the Niece, that the Grand-mother out of her naturall affection, gave her Niece her dyet freely, and therefore no ſatisfaction was to be required for the ſame. It was replyed on the other

ther ſide, That the Grand-mother, might have been ſuppoſed, to have given the dyet freely, if the charges thereof, had appeared, to have been taken out of her own proper eſtate: other waies it was more likely, that it was done, out of that, which belonged to the Niece. Some were of opinion, that the charge ſhould have been caſt upon both eſtates. *Paulus* returned anſwer, That the determination the difference, depended upon the matter of fact the preſumption of the Grand-mothers liberality doth not alwaies hold; How if ſhe openly profeſſed that ſhe expected ſatisfaction from the Tutors, or from the child coming to years? And therefore he was of opinion, that the heires of the Grand-mother, ought to be heard, if they can ſhew, the charges of the Nieces dyet, were put unto her account.

2 *Of Monies laid out in reſpect of one, proving to be for the benefit of another.*

D. 3. 5. 45.

Titius conceiving his ſiſter to be heire to *Sempronius*, by his will, payd mony to ſome, to whom *Sempronius* was indebted, which afterwards proved otherwiſe; *Sempronius* his ſonne appearing to be his heyre, It was queſtioned, whether the ſonne were bound to give him ſatisfaction, for what he had laid out? *Vlpian* anſwered, although what *Titius* had done, was in contemplation of his ſiſter, yet in truth, the ſonnes eſtate, was better thereby, and therefore he might have recourſe againſt him, who in *equity*, was bound to give him ſatisfaction.

3 O

3 *Of a Debt acknowledged by a Factor, on his Maſters behalfe.*

D. 14. 3. 20.

Octavius Felix a Scrivenor, imployed *Octavius Terminalis* in his buſineſſe, who wrote to *Dorius Felix* in this manner; Sir, There remaines in my Maſters hands a hundred pounds, which I am to pay unto you, before the firſt of May, *Octavius Felix* ſhortly after dyed, without any heyre, and left not goods ſufficient to pay his debts: It was queſtioned, whether *Octavius Terminalis* was liable by his letter, to be ſued for the hundred pounds? *Scævola* anſwered, that by writing that letter, he was not bound in Law, neither was there any *equity* why he ſhould pay the ſame; becauſe what he wrote, was in duty of his place under his Maſter, to ſhew the account, not to charge himſelfe.

4 *Of Goods received by the Servant, converted to the Maſters uſe.*

D. 15. 3. 16.

ONe left his ground to his ſervant, to be tilled, or manured by him, and furniſht him with Oxen to that purpoſe, which proving unſerviceable, he willed them to be ſold, and with the monies, others to be bought in their ſtead: the ſervant ſold thoſe Oxen, and bought others, but paid not for them, and afterwards proved nothing worth; he that ſold the Oxen, demanded the mony of the Maſter, becauſe the Oxen bought, were converted to his uſe: It was queſtioned, how farre the Maſter was anſwerable? *Alfenus* anſwered, That it was true, that the later Oxen were converted to the Maſters

uſe, deducting what the former Oxen were ſold for, and therefore the Maſter was to be condemned in ſo much, as the later Oxen were of better value then the former.

5 *Of a Tutors account, to be made for intereſt, not for gaines.*

D. 46. 7. 47. § 6.

TWo brothers driving a Trade together, as partners, one of them dyed, and left a ſonne, to whom the Uncle, ſurviving became a Tutor; and ſelling all the commodities belonging to the trade, ſet out for his Nephew, his moiety in mony, and went on in the Trade alone, in his own name: It was queſtioned, what he was bound to make good to his Nephew? *Scævola* anſwered, That he was bound to make good the uſe, or profit of the mony but was not to account any thing for the gain made by his Trade.

6 *Of a Tutor anſwerable for gaine, by ſpeciall appointment.*

D. 26. 7. 58.

LVcius Titius, who in his lifetime imployed *Pamphilus* and *Diphilus* in his Trade, and negotiation, in his will, appointed them Tutors to his children, & ordained, that they ſhould manage his Trade and affaires, as formerly they had done. They took upon them, the adminiſtration of the eſtate during the Minority of the children, and *Diphilus* put to their account, the profits which he raiſed by trade; but *Pamphilus* thought to be diſcharged, by giving an account only of the uſe mony, or intereſt for ſo much as came unto his hands, as it is uſual when

when one is ſued, by occaſion of Tutorſhip: It was queſtioned, whether *Pamphilus* were not lyable to anſwer, for what he gained by imployment of the ſtock, as well as *Diphilus*? *Tryphonius* anſwered, That the Teſtator willing, that they ſhould manage the buſineſſe for the Minors, as they had done for himſelfe, he was liable.

7 *Of Alimony, and Education to be allowed to a Tutor, for a Minor.*

D. 2. 2. 4.

ONe made his ſonne a Minor, his heyre; and bequeathed to his Daughter for her Dower, two hundred pounds, and nothing elſe; and appointed *Sempronius* Tutor to them both; at the inſtance of the kindred, *Sempronius*, being called before a Magiſtrate, was ordered, to allow her Alimony, and to pay wages to ſuch, as ſhould inſtruct her in the Liberall Arts. The Sonne coming to full age, payd unto his Siſter, then being of ripe years, the two hundred pounds, given to her as a legacy: It was queſtioned, whether he were alſo bound, to allow unto the Tutor, what he had expended for Alimony, and inſtruction of his ſiſter? *Julianus* was of opinion, That although, without the order of the Magiſtrate, he had done thoſe things, ſhe having no other means to be maintained, the Tutor ought not to be queſtioned for the ſame.

8 *Of a Tutor keeping to his own uſe a Minors goods, which a Chapman refuſed.*

D. 26. 7. 56.

A Tutor ſold cattell, belonging to a Minor, and he that bought them, not paying the price, detained them to his own uſe, and allowed mony for them to the Minor upon his account. The Tutor dying, his heyres enjoyed the cattell divers years. When the Minor came to full age, It was queſtioned, whether the late Minor, had any right to the Cattell? It was anſwered by *Scævola*, as the caſe was propoſed, he had no right.

9 *Of Curators of the City, not to be queſtioned for more then came to their hands.*

D. 3. 5. 26.

A *Citizen* by his will bequeathed his goods to the City, the Magiſtrates appointed three Curators, *Sitius*, *Seius*, and *Gaius*, being then of good ability to manage the eſtate; they, of their own accords, divided the adminiſtration of the goods among themſelves ſeverally; it happened after a while, that the will, by which the goods were bequeathed to the City, we proved to be voyd, and *Sempronius* next of kinne, was admitted as heyre: in the mean time *Titius*, one of the Curators failed in his eſtate, and dyed nothing worth: It was queſtioned, whether *Sempronius* might recover of the other two that part of the eſtate, which came to *Titius* his hands? *Modeſtinus* delivered his opinion, that

that what was wanting, by his default, who managed part alone by himſelfe, ought not to be imputed to the other two Curators, and that the heyre muſt be contented to ſuſtaine the loſſe.

10 *Of the Publique Mony of the City let out to uſe.*

D. 22. 1. 11.

Gaius Seius, who managed the publique Treaſure of the City, lent mony to uſe, according to the cuſtome of the place, for foure in the hundred; and in the ſame place, it was likewiſe the cuſtome, if any debtors failed, at the time appointed, to bring in the intereſt or uſe mony; that thence forth, they ſhould pay after the rate of ſix in the hundred: it happened, that ſome Debtors, brought not in the monies at the time appointed, others brought in more then the uſuall rate, at foure in the hundred, ſo that reckoning the one with the other, the Cities monies might be made good. It was queſtioned, whether the monies received, above the ordinary from debtors, ſhould acquit *Gaius Seius*, by whoſe negligence, others had failed; or whether the advantage thereof, ſhould redound wholly to the City, and *Gaius Seius* ought out of his own eſtate to make good the reſt; *Paulus* anſwered, If *Gaius Seius*, contracted with the debtors, for ſuch rates only, as were uſuall, the monies ſo advanced were to be accounted to the City, but if by his own care and induſtry, he had raiſed more then was ordinarily taken, although by Law the monies belong to the City, yet it ſtands with *Equity*, that the monies raiſed above the ordinary

nary rate, ſhould be allowed in ſatisfaction, for what was wanting in the ordinary; unleſſe the City will take upon themſelves, the hazard of all the monies lent out to their uſe.

TITLE

TITLE IV.

Of Penalty, and of Offences wilfully committed.

Penalty is a Right belonging to one man from another, to be ſuffered, or paid by him in reſpect of ſome offence, either malitiouſly or wrongfully committed, or imputed to one as done by him.

SECT. I.

Offences malitiouſly committed, are ſuch as are wilfully done; as, Injury to mens perſons, Theft concerning their goods, & Deceiptfull Dealing in any buſineſſe.

1 *Of Injury done, occaſioned by ones ſelfe.*

D. 47. 10. 15. § 15.

IT was held an Injury to attempt the chaſtity, or by alluring ſpeeches, to move a Virgin or Woman, of free condition, to diſhoneſty. But if a Man, ſaies *Vlpian*, finding a Maid in the habit of a Bond-woman, attempt her chaſtity, the offence ſeems the leſſe; much more if a Free Woman bee found in the habit of

of a Harlot, not of a Matron; and therefore if any man attempt her honeſty, who appears not like a Matron, he is not liable to an action of injury.

2 *Of an Injury done by Errour, or miſtake of the Perſons.*

D. 47. 10. 18. § 3.

IF one doe injury to another, whom he knows not, as taking *Lucius Titius*, to be *Gaius Seius*, it was queſtioned, whether the party ſo injured might require ſatisfaction, in regard the injury was not intended to him, and ſeems done to an uncertain perſon? *Paulus* anſwered, That which was principally intended is moſt prevalent; his purpoſe was to doe an injury, and the party injured, was a certain perſon, although he took him to be otherwise then he was, and therefore the party injured might bring his action: but if one doe injury to a married Woman, whom he conceived to be a Widdow, he cannot be ſaid to have done an injury to her Husband, becauſe his purpoſe, in reſpect of one perſon ought not to be tranſferred unto another, and his intention, and purpoſe in doing the injury, was in reſpect of her, as being a Widdow; but if he had known her to be a married woman, although he knew not whoſe Wife ſhe was, her husband might bring an action in his own name; for if he were not ignorant, that ſhe was a Wife, it may be ſuppoſed he had a purpoſe to doe an injury to her Husband whoſoever he were.

3

3 *Of Threatning, and offering Blowes.*
D. 47. 10. 5. & 15.

AN action of injury lying againſt him, who ſtroke, or beat another man, It was queſtioned, whether if one were not beaten, and ſtruck, but had hands lifted up againſt him, and were much threatned to be beaten, he might bring his action? *Labeo* ſaid, Although a direct action of injury, did not lye againſt him, yet he was lyable to an action of the caſe.

4 *Of diſgracefull Words, but True.*
D. 47. 10. 15. & 18.

THe Prætor affording a remedy, as in caſe of injury, if any man ſpeak words to the diſgrace of another; It was queſtioned, whether he were anſwerable, who was able to juſtify defamatory words? *Paulus* ſaies, That it ſtands not with equity nor juſtice, that he who ſpake diſgracefully of a lewd perſon that deſerved it, ſhould be puniſht for the ſame; becauſe it is fit and neceſſary, that the crimes of men, that are guilty, ſhould be made known and diſcovered.

5 *Of hindering a man from Honour.*
D. 47. 10. 13. § 4.

IF one by his means hindred, that honour was not conferred upon another, as to have his Statua erected, or the like; It was queſtioned, whether he were not liable to an action of injury? *Labeo* ſaid, He was not liable, although it were done with a purpoſe to diſgrace him; becauſe, ſaies he, there is much

much difference, betwixt doing a diſgrace to a man, and not ſuffering him to receive Honour.

6 *Of Injury done by a Magiſtrate.*

D. 47. 10. 13. § 6. & 32.

Vlpian ſaies, that what is done by a Magiſtrate in right of his power, is not lyable to an action of Injury: and he elſewhere ſaies, That the Magiſtrate, hath no power to doe any thing injuriouſly; and that therefore he may be ſued, as in a caſe of Injury, for what he does wrongfully, either as a private perſon, or by colour of his office; but makes it a queſtion, whether he may be ſued during his authority, or when it is expired? And reſolves, That if he be a Magiſtrate of a higher ranke, who without prejudice cannot be called in queſtion, the party grieved muſt exſpect, untill his authority be determined: but if he be a Magiſtrate of inferior ſort, as ſuch, who have not power of death, or imprisonment, he may be ſued, his Office depending.

7 *Of Two or more Stealing the ſame thing.*

D. 47. 2. 21. § 4.

IF two or more, joyning their ſtrength, ſteale a piece of Timber, worth twenty ſhillings, which ſimply alone, none of them could have carried away; It was queſtioned, whether they were all joyntly, or each of them ſeverally, lyable to an action for the double value thereof? *Vlpian* ſaies, That every one of thē was lyable; becauſe it cannot be ſaid that each man ſtole his part, but every one of them joyning

joyning in ſtealing the whole, by conſequence, is liable for the whole.

8 *Of an Infant ſtolne, detained till he grew a Man.*

D. 47. 2. 67.

THe Sonne of a Bond-woman was ſtolne, when he was an Infant, and grew up to the ſtate of a tall young man, in the poſſeſſion, and ſervice of him by whom he was ſtolne: It was queſtioned, according to what value the true owner might bring his action? *Paulus* anſwered; That the theft was ſtill one and the ſame, and the action might be brought according to the greateſt value at any time, whileſt he remained, in the poſſeſſion of him that ſtole him, that is, as the value was, when he was grown to a mans eſtate; not only as it was when he was an Infant, for ſaith he, what can be more rediculous, then to think, that he who ſtole him, ſhould better his own condition, by long continuance of the theft.

9 *Of a Maid-ſervant ſtolne, which was a Harlot.*

D. 47. 2. 39.

ONe inticed away a Harlot, which was ſervant to another man: whereupon it was queſtioned, whether he had therein committed theft? *Vlpian* anſwered, It was no theft, becauſe not the thing done, but the end wherefore it

it is done, ought to be reſpected: & the end where-
fore the Harlot was inticed away, was not to make
gaine, but to ſatisfie luſt; ſo that in truth, the fact
is worſe then theft, and liable to another action
more infamous.

10 *Of two Bond-ſervants pledges, whereof one was ſtolne.*
D. 47. 2. 14. § 5.

ONe who had two Bond-ſervants, left with
him as pledges, or pawnes for a debt of ten
pounds, happened to have one of them ſtolne
from him, the other remaining, being of no leſſe
value then ten pounds; It was queſtioned, whether
he might bring his action only, in reſpect of the
moyety of the debt, becauſe his other moyety, was
ſufficiently ſecured, in the other Bond-ſervant re-
maining? Or whether he ought to have his action
in reſpect to the whole ſumme? becauſe it might hap-
pen, that the ſervant remaining, might miſcarry be-
fore the debt were paid. *Papinian* anſwered, That he
ought to have his action in reſpect of the entire
ſumme of ten pounds; becauſe therein regard was
be had of that which was ſtolne, not of that which
remained ſafe.

11 *Of a Letter ſtolne or Purloyned.*
D. 47. 2. 14. § 17.

A Letter ſent by one man to another, is inter-
cepted by a third perſon, who is therefore
liable to an action of theft: It was queſtioned
who had right unto that action? *Vlpian* ſaies,
ought to be conſidered, who had the right in the
Letter, whether he from whom, or he to whom

was ſent: and ſaid if it were delivered to the ſervant, or ſome other belonging to the party, to whom it was ſent, it ought to be held his proper letter; eſpecially if it concerne him, to receive the ſame, but if it were ſent to be returned againe, the right, or property remained in him, from whom it was ſent; becauſe he had no purpoſe to looſe, or transferre the ſame: He concludes, That the right of action belongs to him, whom it concerned, not to have it ſtolne, that is, to him for whoſe profit or benefit, the contents thereof were written. It may be likewiſe queſtioned, whether he to whom the letter was delivered to be conveyed, might not bring his action for the ſame, if it were ſtolne from him? And it is reſolved he might, if he undertook the delivery, and were paid for the ſame, or were concerned in the contents, as being to receive ſomething, or to have ſomething done for him expreſt therein.

12 *Of Writings, or Bonds purloyned or ſtolne.*
D. 47. 2. 27. & 32.

HEE that ſteales, or purloynes another mans writings or bonds, or the like, is liable to an action of theft, not only according to the value of the paper, or parchment, but alſo of the debt, or ſumme contained therein, (ſaies *Vlpian*) if it concerned the owner, for ſo much; as if the writing, or bond were for ten pounds, the action might be brought for twenty, as the double value: whereupon it was queſtioned, If the ſumme, or mony mentioned in the writing or bond were paid, before it was ſtolne, whether the action lay for ſo much, the writing or bond being then of like concernment? To which the ſame *Vlpian* anſwers, Although the debt be paid, the debtor may require to have his bond

it is done, ought to be respected: & the end wherefore the Harlot was inticed away, was not to make gaine, but to satisfie lust; so that in truth, the fact is worse then theft, and liable to another action more infamous.

10 *Of two Bond-servants pledges, whereof one was stolne.*

D. 47. 2. 14. § 5.

ONe who had two Bond-servants, left with him as pledges, or pawnes for a debt of ten pounds, happened to have one of them stolne from him, the other remaining, being of no less value then ten pounds; It was questioned, whether he might bring his action only, in respect of the moyety of the debt, because his other moyety, is sufficiently secured, in the other Bond-servant remaining? Or whether he ought to have his action in respect to the whole summe? because it might happen, that the servant remaining, might miscarry before the debt were paid. *Papinian* answered, That he ought to have his action in respect of the entire summe of ten pounds; because therein regard was to be had of that which was stolne, not of that which remained safe.

11 *Of a Letter stolne or Purloyned.*

D. 47. 2. 14. § 17.

A Letter sent by one man to another, is intercepted by a third person, who is therefore liable to an action of theft: It was questioned who had right unto that action? *Vlpian* saies, he ought to be considered, who had the right in the Letter, whether he from whom, or he to whom it was

was ſent: and ſaid if it were delivered to the ſervant, or ſome other belonging to the party, to whom it was ſent, it ought to be held his proper letter; eſpecially if it concerne him, to receive the ſame, but if it were ſent to be returned againe, the right, or property remained in him, from whom it was ſent; becauſe he had no purpoſe to looſe, or transferre the ſame: He concludes, That the right of action belongs to him, whom it concerned, not to have it ſtolne, that is, to him for whoſe profit or benefit, the contents thereof were written. It may be likewiſe queſtioned, whether he to whom the letter was delivered to be conveyed, might not bring his action for the ſame, if it were ſtolne from him? And it is reſolved he might, if he undertook the delivery, and were paid for the ſame, or were concerned in the contents, as being to receive ſomething, or to have ſomething done for him expreſt therein.

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bond delivered up, or pretend that mony was paid by him, when none was due; in which respects, it concernes the Creditor to have the writing, or bond in readines, to prevent trouble which for want thereof, might happen unto him. Againe it is questioned, If one who hath lost his bond, hath other writings, or means to prove his debt, whether he may sue for the double value of what is contained in the bond; for it seems he hath lost nothing, whose debt is secured, by another bond or writing. some again doubt why an action should lye for more then the value of the paper or parchment? Because that if upon the action of theft, he can make it appeare, what the debt was, he may make the same likewise appeare, when he shall have occasion to sue for the debt; and if upon his action of debt, he cannot make the summe appeare, how can he be able to shew, how farre the losse of the bond, or writing concerned him? *Paulus* answered, That it might fall out, that after the theft was committed, the writings might come to his hands, by which he might be able to prove, how much it had concerned him; and the right of action, being once accrued from the theft, continues, although the case be altered afterwards.

13 *Of Things Taken up, whereof the owner is not known.*

D. 47. 2. 43.

HEE that takes up any thing being on the ground, and carries it away, with a mind to gain the same, is guilty of theft, saies *Ulpian*, whether he knowe the owner, or know him not; for it abates nothing in the point of theft, that the owner of the thing, is a person unknown: but if the owner

owner left it, as a derelict, that is, a thing which he intended not to look after againe, although he who took it up, had a purpose to conceale, and gaine the same, it is no theft; for theft is not committed, unles there be some body, who is prejudiced thereby, which in this case cannot be; Because it is received for a certain rule, which *Sabinus*, and *Cassius* deliver, That he who leaves a thing, with a mind never to have it againe, ceases to be owner thereof: but if it were not left as a derelict, yet if he who took it up, conceived it to be so, he is not guilty of theft: and againe, if it were not left as a derelict, nor he who took it up, conceived it to be so, yet if he had no intention to gain the same, but to restore it to the owner, he is free from guilt; much more he, who having found any thing, setts up bills to signify so much, although he demanded a reward for finding and preserving it.

14 *Of an Atturney, receiving Mony without Commission.*

D. 47. 2. 43.

HE E, who as a Proctor, or an Atturny, without any commission, or authority, receives mony, seems to commit theft, saies *Vlpian*: but *Neratius* saies, that is not to be admitted but with distinction; For it is true, if a debtor deliver unto him mony, with an intention, that it should be returned unto his Creditor, and the Proctor detaine the same to himselfe, it is theft, For the mony still continues the debtors; and the Proctors possessing himselfe thereof, contrary to the owners

minde, undoubtedly committes theft; but if the debtor, ſuppoſing him to have power to receive ſuch mony to his own uſe, deliver the ſame, although he therein be deceived, the Proctor can in no waies be ſaid to act as a theef, receiving the mony according to the mind, and will of the owner.

15 *Of one Taking privily what he had Lent.*

D. 47. 2. 59.

HEE, who lent ſomething unto another privily, without the conſent of him towhom it was lent, took it away: It was queſtioned, Whether he were liable to an action of theft? *Julianus* anſwered, That he had not committed theft, becauſe he was owner of what he took away; which yet he limits, unleſſe he, to whom it was lent, had ſome juſt cauſe to detaine the ſame, for if he had laid out neceſſary charges, for preſerving the thing lent unto him, it concerned him, rather to keep the thing lent, untill he were ſatisfied, then afterwards to ſeek his remedy, by way of ſuit for the ſame, and that in ſuch a caſe, he might bring his action, as in a caſe of theft.

16 *Of one Taking away what had been Stolne from him.*

D. 47. 2. 48.

ONe, who had loſt a piece of Silver plate brought an action of theft, againſt him who had embezelled the ſame, & a queſtion, and difference ariſing about the weight thereof, the owner alledging it to be more, the defendant denying it to be ſo much, produced the piece, which the owner preſently ſnatched out of his hands, and

kept the ſame, which notwithſtanding, he who embezelled it, was condemned in the double value thereof; whereupon it was doubted? Whether the ſentence were juſt? *Vlpian* anſwered, It was juſtly given; for the thing it ſelfe, which was ſtolne, was not conſiderable in the action, wherein by way of penalty, the double value was to be allowed: He likewiſe relates, That when one had ſtolne ſome goods, and ſold the ſame, the owner of the goods, extorted from him the mony, which was received for the price thereof, It being queſtioned, whether he had committed theft? It was reſolved he had; becauſe it was without all doubt, that the procede, or price of the thing ſtolne, was not the ſtolne thing.

17 *Of Procuring Credit to an inſufficient party.*

D. 4. 3. 7. & 8.

Lvcius being deſired to lend mony to *Seius*, whom he did not know, enquired of *Titius*, to whom *Seius* was known, concerning his ability, who affirmed, that he was a man, that might be truſted for ſuch a ſumme: The mony being thereupon lent, & *Seius* proving inſolvent, *Lucius* would have brought an action againſt *Titius*, for deceitfull dealing, but *Cæcidianus* the Prætor, would not give way unto it, which *Vlpian* ſaies was rightly done; becauſe that action may not be brought, but where there was a great and evident purpoſe of deceiving: yet *Gaius* ſaies, That if when he knew, that he was of a broken condition, for ſome gain to himſelfe, he affirmed his credit, in regard he commended him with a purpoſe of deceiving another, that action may be juſtly brought againſt him.

18 *Of a falſe commendation of a thing to be ſold.*

D. 4. 3. 37.

ONe who deſired to buy a Horſe, which was ſure of foot, repairing to an Horſe-courſer, and enquiring for one of that condition, had one ſhewed unto him, which the owner knowing his qualities, commended for a moſt ſure horſe, or that would neither ſtumble, nor trip; with which commendation he ſold his horſe at a very good price. The firſt journey wherein the buyer made triall of him, he fell, and broke the riders legge. It was queſtioned, Whether the Horſe-courſer were not liable to the action of deceitfull dealing? *Vlpian* ſaid, That which a ſeller ſpeaks by way of commendations in generall, is to be underſtood as neither ſpoken, nor undertaken by him; but if he gave ſome ſpeciall commendations, with a purpoſe to deceive the buyer, he can neither be ſued for his commendations, nor for a promiſe, but he may be queſtioned for deceitfull dealing.

19 *Of making a falſe claime to another mans prejudice.*

D. 4. 3. 33.

ONe having a commodity ready to ſell, towards the end of the Market, the buyer having taken good likeing thereto, another makes clayme to the commodity, and threatens to bring a Sergeant to arreſt it; whereupon the buyer departed, and the third perſon deſiſted his clayme, whereby the ſale was fruſtrated. It was queſtioned, What remedy he might have, that received the prejudice? *Vlpian* ſaid, That the true owner of the commodity might bring his action on the caſe, for the ſatisfaction of his loſſe.

20 *Of*

20 *Of the Like.*

D. 4. 3. 9. § 3.

Lucius being poſſeſt of ſome parcells of oyles taken out of a ſhip, *Seius* arreſted them, as his own, and began a ſuit againſt them. The oyles being periſhable in value, it was agreed betwixt them, that they ſhould be put into the hands of *Sempronius* by way of ſequeſtration, to be ſold by him, and the mony to be kept for his uſe, to whom they ſhould be adjudged, *Seius* let fall his ſuit. It was queſtioned. Whether *Seius* might be ſued for deceitfull dealing? Some were of opinion he might; becauſe *Sempronius* could not be ſued to deliver the Oyles, untill the cauſe were ended: but *Pomponius* was of opinion, That an action of the Caſe might be brought againſt *Sempronius*; but if that he proved inſolvent, that then the action held againſt *Seius*.

21 *Of lending falſe Weights.*

D. 4. 3. 18. § 3.

Vnius being to ſell a commodity, *Lucus* knowingly lent him falſe weights, to weigh his commodity withall. *Trebatius* ſaid he was liable to the action of deceitfull dealing. Others were of a contrary opinion, Becauſe if the weights were too heavy, the ſeller might recover what he had delivered too much; and if they were too light, the buyer might have the like remedy concerning the price: but if it were agreed that the commodity ſhould paſſe according to ſuch weights, and he with a purpoſe to deceive, affirmed his weights to be juſt, the action did hold.

22 *Of a Counterfeit Letter.*

D. 4. 3. 38.

Lvcius, who owed mony to *Seius*, underſtanding that *Seius* was much obliged to *Sempronius*, cauſed a Letter to be conveyed to *Seius* in the name of *Sempronius*, wherein it was requeſted, that he would remit that debt to *Lucius*; *Seius* being deceived by this letter, ſent an acquittance of the debt of *Lucius*, by him who brought the letter: Afterwards it appeared to him, that the letter was falſe, and counterfeited; Whereupon *Vlpian* was adviſed what might be done in this caſe. He reſolved, That *Seius* the Creditor, if he were under the age of twenty five years, might ſue to be relieved and reſtored, againſt that acquittance: and if he were above that age he might bring his action againſt *Lucius* for coſenage, or deceitfull dealing.

SECT.

SECT. II.

Of Offences wrongfully Committed.

Offences are done wrongfully, when one by fault or negligence, doth hurt or dammagr to another man, for which he is liable to make ſatisfaction, according to the value of the thing, at any time in a yeare, ſometimes, what it was worth in thirty daies before.

1 *Of Corne fired by burning of Furze.*

D. 9. 2. 30. § 3.

IT was queſtioned, If a man, with intention to burne the Stubble, or Furze upon the ground, ſet fire thereunto, which fire diſperſing farther, burnes another mans corne, or vineyard, how farre he is liable for the loſſe or dammage. *Paulus* ſaies, it is to be conſidered, whether it were fooliſhly or negligently done, for if he put fire on a windy day, he ought not to be excuſed; for he is ſuppoſed to doe a dammage, which gives occaſion thereof: and he is in like fault, who did not take care, that the fire might not ſpread ſo farre; but if all things requiſite were obſerved, he is without blame.

22 *Of a Counterfeit Letter.*

D. 4. 3. 38.

Lucius, who owed mony to *Seius*, understanding that *Seius* was much obliged to *Sempronius*, caused a Letter to be conveyed to *Seius* in the name of *Sempronius*, wherein it was requested, that he would remit that debt to *Lucius*; *Seius* being deceived by this letter, sent an acquittance of the debt of *Lucius*, by him who brought the letter: Afterwards it appeared to him, that the letter was false, and counterfeited; Whereupon *Ulpian* was advised what might be done in this case. He resolved, That *Seius* the Creditor, if he were under the age of twenty five years, might sue to be relieved and restored, against that acquittance: and if he were above that age he might bring his action against *Lucius* for cosenage, or deceitfull dealing.

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2 *Of Hurt done by Lopping a Tree.*

D. 9. 2. 31.

IT was queſtioned, If one Lopping a Tree, did throw down a bough, or limme thereof, whereby another mans Servant or beaſt was killed, or hurt, Whether he were liable for the loſſe? *Paulus* ſaies, he was liable, in caſe it were done in a common high way, if he did not give warning, ſo that the falling thereof might have been avoided. *Mucius* ſaies, it is the ſame in a private way, if it happened by that neglect, which by a carefull man might have been prevented; or if warning were given when it was too late: but if it fell out in a place where there was neither a publique nor private way, nothing is required, but that it be not wilfully done; For he ought not to be held faulty, that could not foreſee, whether any were likely to paſſe that way or no.

3 *Of Hurt done in Sport or Play.*

D. 9. 2. 52. §4.

DIvers boyes playing at Ball together, when one ſtrived to take the Ball, another thruſt him aſide, by occaſion whereof he fell, and broke his legge: It was queſtioned, Whether the Maſter of the Boy ought not to have recompence according to the Law, againſt him who threw him downe? *Alfenus* anſwered, He could have no remedy, becauſe the hurt was done, rather by chance, then by any wilfull fault.

4 *Of*

4 *Of Hurt done upon Provocation.*

D. 9. 2. 52.

A Shopkeeper in the night time, ſet a Lanthorn with a Candle upon his ſtall, a Bond-ſervant paſſing by, ſnatcht it up, and carried it away. The Shopkeeper following, demanded his Lanthorne, and laid hold of the Bond-ſervant, to hinder him from running away. Whereupon he, to free himſelfe, ſtruck the Shopkeeper with a pike ſtaffe, whereupon the fray increaſing, the Shopkeeper thruſt out one of his eyes. It was enquired, Whether he were not liable to the Law, having unduly done a dammage? *Alfenus* anſwered, that he was of opinion, That the dammage was not unduly, or wrongfully done, unles wilfully, and of ſet purpoſe he had put out the eye, but that the fault was in him who firſt ſtruck with his pike ſtaffe, and if the ſhopkeeper had fought, before he had been ſtrucken, he might have borne the blame.

5 *Of Hurt done by way of Correction.*

D. 9. 2. 5. § 3.

A Shoomaker who had directed a boy how to doe his worke, finding the Boy had not obſerved his directions, ſtruck him in the poll, with the laſt of a ſhooe, by occaſion whereof he loſt his eye: It was queſtioned What remedy might be given againſt him? *Julianus* ſaid, he was not liable to an action of Injury, becauſe he did it not with an injurious intent; but doubts not, but that he was liable to make ſatisfaction: which is confirmed by *Paulus*, that the Maſters too great ſeverity is held a fault. Whereupon it was concluded, that the Father of the Boy might recover the loſſe he ſuſtained in forbearing his Worke, and the charges he was at in having him cured.

6 *Of*

6 *Of one Killed by a Barbers Razor, ſtruck with a Ball.*

D. 9. 2. 11.

SOme young men playing with a Ball, one of them ſtruck it ſo, that lighting upon a Barbers hand, having a Razor therein, by occaſion thereof, the throat of a Servant, whom he was ſhaving, was cut; It was queſtioned. Who was liable forthe loſſe? *Mela* ſaies he was liable, which was in fault. *Proculus* was of opinion, that the Barber was in fault; with whom *Vlpian* agrees, if the Barber did uſe his trade where men doe uſually play at ball; yet confeſſeth, that it may not without reaſon be argued, That if one, knowing the Barbers chaire, to be in a place of danger, put himſelfe under his hand, that the fault might be imputed to himſelfe.

7 *Of a Boy following two Carts, cruſht to Death.*

D. 9. 2. 52. § 2.

TWo Carts drawn by Mules, were driven up the ſteep way leading to the *Capitol*. The Carters of the former, to help forward the Mules, ſet their ſhoulders to the Cart, and that chancing to fall backwards, withdrew themſelves; whereupon the former falling upon the latter, forced it backward down the hill, ſo that a boy was cruſht to death thereby: It was queſtioned, Againſt whom the Maſter of the Boy might bring his action? *Alfenus* anſwered, The judgement ought to be given according to the circumſtances of the fact; for if the Carters, who put their ſhoulders to the uppermoſt Cart, wilfully withdrew themſelves, and thereupon the Mules could not ſtay it from falling back-

ward

ward, the action did lye againſt them; for they were no leſſe faulty in ſuffering it to fall foule on the other, then if a man let fall a weapon, which he might have held, whereby another man is hurt. But if the Mules of the former, being skittiſh, ſtarted aſide, ſo that the Carters withdrew themſelves, for feare leaſt the Cart might have runne over them, no action lies againſt the men, but againſt the owners of the Mules. But if the fault were neither in the Mules, nor in the Men, as becauſe the Mules were too weak to draw the weight, and ſtriving therewith fell downe, and the men could no longer ſupport the Cart, neither were the owners of the Mules, nor the Carters liable. Howſoever it happened; It is certaine no action lies againſt the owners of the later Mules, becauſe they were forced to fall back.

8 *Of Dammage done to Cattell, found in another mans ground.*

D. ad leg. Aquil. 39.

Quintus Mucius relates a Caſe, One mans Mare being great with fole, feeding in another mans ground, in driving out, caſt her Colt. It was queſtioned, Whether the owner might bring his action againſt him that drove her, becauſe by driving her, he made her looſe her Colt. It was held, that if he ſtruck, or willingly, drove her away violently, he might bring his action. *Pomponius* adds, That although a man find another mans cattell in his ground, he ought ſo to drive them forth, as he would drive his own; Becauſe if he hath received any dammage, he hath his proper remedy by way of action. And therefore he, who finds another mans cattell in his ground, cannot lawfully impound them

them in his own ground, nor drive them out otherwiſe then he would doe his own. But he ought to drive them out without doing them any hurt, or give notice to the owner to fetch them away.

SECT. III.

Of Offences imputed.

Offences imputed are when one is affected by what is done by another; as when by ones Tutor, Servant, Cattell, or things in his poſſeſſion another man is damnified, for which he is liable to the penalty of Law, or to make ſatisfaction, according to the value of the damage, or to deliver up his Bondſervant or Cattell that did it, or to remove, or repaire, that whereby an annoyance is occaſioned.

1 *Of Wrong done out of the duty of ones Charge, not to be imputed to the party.*

D. 34. 9. 22.

HE who goes about to overthrow a Will, as made unduly, ought to receive no benefit by the Will if it ſtand good: Yet it ſtands with good reaſon, ſaies *Triphoninus*, That a Tutor, who on his Pupils behalfe, objects againſt a Will, although he faile in making good, what he intended, ſhould not looſe any Legacy given him therein; Becauſe the neceſſity of his charge, and the truſt repoſed in him as a Tutor, ought to excuſe him. For diverſe rights

rights or intereſts concurring in the ſame perſon, they are in themſelves diſtinct; and ſo is the relation of a Tutor, from the condition of a Legatory: and whereas the oppoſition made to the Will, was not in the right of his own perſon, but for the intereſt of his Pupill, he ought to ſuffer nothing in his own condition: But what was given to the Pupill in the Will, proves voyd, unleſſe by the Princes favour it be preſerved.

2 *Of Dammage done by a Servant common to two Maſters.*

D. 9. 4. 17.

A Bond-ſervant which was common to two Maſters, did a dammage wrongfully, to which one of the owners was privy; the other was altogether ignorant. It was queſtioned, whether if the latter delivered up the Bond-ſervant, the other were freed? *Paulus* ſaid, That if the dammage amounted to more then the Bond-ſervant was worth, the reſt may be recovered of the other owner, allowing him conſideration, of a moyety of the value of the Bond-man, in regard of his intereſt in him.

3 *Of one mans Ram killing another.*

D. 9. 1. 1. § 11.

IT happened that two Rammes, belonging to ſeverall owners, fighting together, the one killed the other. It was queſtioned, Whether the owner were bound to make ſatisfaction for the loſſe? *Quintus Mucius* anſwered; That if it can be proved, That the Ramme which was killed, did firſt provoke, and aſſault the other, the action would

would not hold; but if that which, without provocation, was first assaulted, was also killed, the owner thereof ought to give satisfaction, or deliver up his Ram as liable for the dammage.

4 *Of Water falling from a higher ground into a lower.*

D. 39. 3. 1. § 22.

IF a Work or Banke, anciently erected in one mans ground, being removed, the Water naturally falling into the lower ground, belonging to another, some annoyance, or inconvenience growes thereby: It was questioned, Whether he who suffered the inconvenience might have remedy? *Labeo* answered, he could have no remedy, because the lower ground, alwaies owes that service to the higher, as to receive the water falling from it: but if by removing the worke or banke, the water falls more violently into the lower ground, then naturally it did, and thereby an annoyance, or inconvenience groweth; he confesses, that he may bring his action for remedy thereof. He saies moreover, That not only the nature, and scituation of the grounds, but the conditions imposed, or agreed upon, and the ancient use observed, time out of mind, ought to be considered: By the naturall scituation, it is true, the lower ground owes such a service to the higher, and if there be any inconvenience therein, it is recompenced with another convenience, because by fall of the water, the soyle is enriched, and improved; yet sometimes, by consent of parties, it is agreed, how watercourses should passe from one ground to another, and if there appeares no such conditions, or agreements the ancient use ought to be observed.

5 Of

5 *Of a Banke removed by Caſualty.*

D. 39. 3. 2. § 5.

IT happened, that the violence of a Land-floud brake down a banke in one mans ground, which kept in a Watercourſe, from annoying the neighbours grounds which were neare it. It was queſtioned, Whether the owner of the ground were bound to repaire the banke? *Alfenus* anſwered, That if the banke were naturall, he was not bound to repaire it, nor could be compelled to ſuffer it to be repaired by others, and if it were artificiall, and no man living could remember, that the owner of the ground had repaired it, he was likewiſe free; but if in the memory of man, it had been repaired by the owner of the ground, he might be compelled thereto. *Labeo* ſaid, If the banke were artificiall, although no man living could teſtify, that the owner of the ground had raiſed it, yet he might be required and compelled to ſuffer it to be repaired: For although no man could bring an action, to compell another, to doe ſomething for his benefit; yet he might bring one, to cauſe him to ſuffer, that to be done, whereby he himſelfe could receive no prejudice. He affirmes the ſame, although the banke were naturall, and concludes, If the Law be defective, yet it conſiſts with *Equity*.

6 *Of the like Caſe.*

D. 39. 3. 2. § 6.

NAmuſa ſaid, That if a current, paſſing into a lower ground, be obſtructed or ſtopped with mud, by occaſion whereof, ſome annoyance or inconvenience happens to a higher ground, the owner

owner of the higher ground, may ſue the owner of the lower ground, to ſuffer him to remove the obſtructions, and cleanſe the ſtreame; becauſe the action holds, not only where ſome worke is raiſed by the hands of men, but alſo where it happens that ſome annoyance ariſeth beſides expectation and by chance. *Labeo* argues againſt *Namuſa's* opinion, That the condition of grounds may admit alteration from the grounds themſelves; and when ſuch alteration happen, every man muſt reſt contented, whether the grounds be made the worſe or better: Likewiſe as if an alteration happen by an Earthquake, or violent tempeſt, upon which occaſion, no man is bound to give way to have things reſtored to their former condition. But *Paulus* inclines to *Namuza's* opinion, ſaying, That whatſoever may be maintained in point of ſtrictneſſe of Law, this in *Equity* it ought to be admitted.

TITLE

TITLE V.

Of Inheritances Teſtamentary, and of Inſtitution of Heyres.

An Inheritance Teſtamentary, is a Right ariſing from a laſt Will or Teſtament, of ſucceeding in the Teſtators whole eſtate, and is either by way of Inſtitution, Subſtitution, or deviſing in Truſt.

SECT. I.

Inſtitution is when one or more are appointed Heyres in the firſt place.

1 *Of a Child ſuppoſed in the Wombe made Heyre.*

D. 28. 2. 25.

Lucius Titius being in the City, when he made his Will, and having a Niece, to wit, his Daughters Daughter, great with child, then abiding in the Country, made the Child in his Nieces wombe one of his heyres. It happened that the ſame day that *Titius* made

his Will in the City, his Niece in the Country was delivered of a Sonne. It was doubted, Whether he ought to be his heyre? becauſe when the will was made, the child was not in the Mothers Wombe, but brought forth into the World *Paulus* anſwered, That it is true, The words in the Will mentioned a child in the Wombe, which ſhould be born after the making thereof, but if, as the caſe is put, the Niece were delivered before the Will was made, the Teſtator not knowing ſo much, It ought in right to be allowed as heyre.

2 *Of Heyres made of Eſtates in ſeverall places.*
D. 28. 5. 35.

Marcus Æmylius a rich Citizen, having a great eſtate, partly in Italy, partly in Sicily then a Province under the Romanes; made two Heires *Cornelius*, and *Sergius*, one, that was *Cornelius*, of that eſtate or goods which he had in Rome or Italy, the other *Sergius*, of what he had in the province of Sicily. He trading betwixt both places, It happened that in his life time, he had conveyed mony into Sicily, to buy goods or commodities to be remitted to Rome. It was queſtioned, Whether that money or the proceede thereof remaining at the time of his death with his Factor in Sicily, did belong to *Cornelius*, who was heyre for that eſtate and goods which he had in Italy, or to *Sergius* who was heyre to that eſtate which he had in Sicily? *Vlpian* anſwered, That in truth, it depended upon the will and meaning of *M. Æmylius* the Teſtator, what ſhould be reputed good of the one place or of the other; becauſe the Will of the Teſtator, if it may appeare, is all in all; and that muſt be followed which the Teſtator meant, Other-

wiſe

wife, it is to be underſtood, that thoſe things are comprehended under the notion of things, or goods in Italy, which he had remaining there conſtantly, and provided ſo to have them. But if yet at any time, he conveyed the ſame into another place, not with a purpoſe that they ſhould continue there, but to have them returned againe, thoſe ſhall neither increaſe the ſtock in the place whether they are conveyed, neither ſhall they diminiſh the ſtock of that place from whence they are ſent. As for inſtance: If a man, out of that part of his patrimony which he hath in Italy, ſends his ſervant with money into the Province, to buy commodities, and to returne with them to Rome. It is no doubt, but the money and the commodities when they are bought, belong to that part of his patrimony, which is in Italy; and ſo *Mucius* determines, in the caſe of a Legacy. If one who hath grounds in ſeverall places, and Cattell, as Oxen uſually imployed in thoſe ſeverall grounds, and bequeath one of the grounds with the Cattell appertaining thereunto, and at his death, the Oxen of the other were ſent thither, to till that ground, they ſhall not be comprehended in the legacy; becauſe they were not deſtinated to that place, to continue there.

3 *Of a Diſpoſition of ſo much if a Sonne be borne, of ſo much if a Daughter, and a Sonne and Daughter both are borne.*

D. 28. 2. 13.

THe ſtate being uſually diviſeable into twelve parts; One, whoſe Wife was great with child, made his Will in this manner; If my Wife be delivered of a Sonne, my will is that he ſhall have eight parts of my eſtate, and my Wife the reſt,

(which was foure) but if ſhe be delivered of a Daughter, my Will is that my Daughter ſhall have foure parts, and my Wife the reſt. It happened that ſhe was delivered, both of a Sonne and of a Daughter. It was queſtioned, How the eſtate ſhould be devided? *Julianus* anſwered, That the eſtate was to be devided into ſeaven parts, whereof the Sonne was to have foure parts, the Wife two, and the Daughter one; For although he made no proviſion both for a Sonne and a Daughter, yet in regard he intended to his Sonne a double proportion, to that of his Wife, and to his Wife a double proportion to that of his Daughter, Therefore this diviſion was agreeable to his mind, and, as *Juventius Celſus* affirmed, moſt reaſonable.

Of the like Caſe.

D. 28. 5. 81.

Clemens Patronus ordained in his laſt Will, his Wife being great with Child, That if a Sonne were borne unto him, he ſhould be his ſole Heyre, if two Sonnes, they ſhould be equally his heyres, if two Daughters, likewiſe they ſhould be his Heyres in the ſame manner, if a Sonne and a Daughter, he gave two parts of his eſtate to his Sonne, and a third part unto his Daughter. It happened that there were two Sonnes and a Daughter borne. It was queſtioned, What was to be done in that caſe? *Paulus* anſwered: Whereas he intended, that the Sonnes ſhould be equall, and that a Sonne ſhould have a double proportion in reſpect of a Daughter, that the eſtate ſhould be divided into five ſo that the Sonnes ſhould have two parts a piece, and the Daughter ſhould have one, that is, a fifth part. *vid. l.* 47. *D. eod.*

5 Of

5 *Of Heyres made upon condition of Marriage.*

D. 28. 7. 23. 24.

LVcius Titius having two brothers, and a kinswoman, whom he well affected, made his Will, and disposed of his estate in this manner, he of my brothers, which shall marry my kinswoman *Fulvia*, shall be heyre for nine parts of my estate, and he that shall not marry her, shall be heyre for the other three parts. It was questioned, If she refused to marry either of them, or dyed, before either of them could marry her, how the estate should be devided betwixt them? *Papinian* answered, That the Brothers ought to be heyres equally, for the whole estate; because it is plaine, he made them both his heires, and the difference of the parts given unto them, depended upon the successe, or event of the Marriage; to which *Marcellus* adds, That a condition, If one shall Marry such a Woman, or do such a thing, ought to be understood perform'd, where be no default in him, whereby he is not married, or the thing not done.

6 *Of an Heyre made, upon an absurd condition.*

D. 28. 7. 27.

ONe in his Will, made another his Heyre, upon condition, that he should throw his ashes or his bones into the Sea. It was questioned, whether, if he that was made heyre upon that condition, if he did not performe it, ought to be put by the inheritance? *Modestinus* answered, It was first to be enquired, whether he who made his heyre, upon that condition, were in his witts, or right sences when he did it, which if it be clear, It is no question but the heyre, although this condition be not performed, shall enjoy the estate, before him, to whom it might

might belong, in case the Will were void. For the heire was rather to be commended, then any way questioned, who forbore to cast the Testators ashes or bones into the Sea, but out of consideration of humane condition, committed them to buriall in a civill way.

7 *Of two Heires made upon condition, not performed by one of them.*

D. 28. 5. 44.

S *Empronius* in his Will, made *Titius* and *Caius* his Heires, and enjoyned them to build a monument for him, within a certain time; and this added, that if either of them should faile to performe it, both should be disinherited: *Titius* refused to meddle with the estate; *Caius* alone built the Monument, and asked advice whether he might now hold as Heire to *Sempronius*, although *Titius* had not intermedled in the estate, nor joyned in the building of the Monument. *Alfenus* answered, That no man was bound unto, or debarred from an inheritance, by anothers fact; but he that had performed the condition required in the will, although the coheire did not intermeddle, nor joyne with him, ought to enjoy the inheritance.

SECT.

SECT. II.

Of Substitution.

Substitution is when one or more are appointed Heires, in case such as were first named, shall dye before the Testator, or refuse to intermeddle in his Estate.

1 *Of a Substitution, if a Sonne or Daughter shall not be a mans Heyre.*

D. 34. 5. 13. § 6.

LVcius Titius made his will, and therein ordained as followeth; If I shall have a Sonne, or a Daughter, he or shee shall be my Heire; if my Sonne or my Daughter shall not be my heyre, then *Seius* a stranger shall be my heyre. It is questioned, Whether if he have not a Sonne, *Seius* hath not right to be his heyre together with his Daughter, or if he have not a Daughter, *Seius* ought not to be co-heyre with his Sonne? *Julianus* saies, The Will was not well conceived; For if it was his meaning, that he should not have been his heyre, in those cases, he should have expresst it thus; If neither my Sonne nor my Daughter shall be my heyre, then *Seius* shall be my heyre. It is true, that it might be his intention, That if he had a Sonne, and a Daughter, that both shall be his heyres: and it might be his meaning, that if he had

but one Sonne and one Daughter, that *Seius* ſhould be his coheyre with the Sonne, or Daughter; or that it was his purpoſe, that if he had neither a Sonne, nor a Daughter, *Seius* ſhould be ſubſtituted as his ſole heyre; and he inclines to this opinion, That the Teſtators meaning ought to be underſtood, that whether he had a Sonne, or a Daughter, *Seius* the ſtranger ſhould not be taken for his heyre, unleſs he had expreſly declared his mind to that purpoſe.

2 *Of a Subſtitution in caſe two Sonnes dye without Children, one of them happening to have Children.*

D. 36. 1. 57. § 7.

Sempronia having two Sonnes *Lucius* and *Titius*, and a Niece named *Claudia*, made both her Sons her heyres equally; and then commended to their truſt, That if either of them ſhould dye before the other, leaving no Children, he ſhould reſtore his part of the eſtate, unto the brother ſurviving: and that if they ſhould both dye without Children, that then her whole eſtate ſhould come unto her Niece *Claudia*. *Lucius* dying firſt, left a Sonne behind him, *Titius* afterwards dyed without any Children. It was queſtioned, Whether his eſtate ought to deſcend unto the Niece? *Papinian* anſwered, That the condition of the Subſtitution being in theſe words, If both the Sonnes dye without children, at the firſt view it might ſeeme, that *Claudia* the Niece could claime nothing, becauſe one of the Sonnes dying, left a Sonne; but he ſaies, if it be better conſidered, it may be thought abſurd, That the condition of the ſubſtitution, by which the whole eſtate was conveyed, failing, yet the condition happening in part, ſhould not worke ſomething, as to derive the part of him who dyed without children, to the Niece to whom, in caſe both had ſo died, ſhe intended the whole eſtate.

3 *Of*

3 *Of Subſtitution of one to be Heyre, in caſe a Child dyed before the age of tenne, and of another, if before the age of fourteen years.*

D. 28. 6. 43.

ONe made his Will, and therein ordained, that his Sonne being an Infant, ſhould be his Heyre, and then declared, that if his Sonne ſhall dye before he accompliſh the age of ten years, *Titius* ſhould be his Heyre, and if he ſhall dye, before he were of fourteen years compleat, then *Mævius* ſhould be his heyre. It happened that the Son dyed, when he was but eight years old. It was queſtioned whether *Titius* alone, ought to be admitted as his ſubſtitute, or whether *Mævius* alſo were not to be joyned with him, becauſe it was certaine, the Sonne dyed both within the age of ten, and alſo within the age of fourteen years. *Paulus* anſwered, The Father had power to ſubſtitute an Heyre unto his Sonne, in caſe he ſhould dye at any time, before he had compleated fourteen years, and no longer. But it is moſt reaſonable, that he having allotted ſeverall times, for two to ſucceed, by way of Subſtitution, that the time allotted to either, ſhould be underſtood ſeverally; unleſſe it can be plainly ſhewed, that the Teſtator intended otherwiſe.

4 *Of one Subſtituted by the Father, to a Son that was Dumb, who afterwards had a Child.*

D. 28. 6. 43.

MÆvius having a Sonne of the age of fourteene years, whom he intended to make his Heyre, in the firſt place; in regard he was dumbe, and could not make a Will, obtained leave of the Emperour to Subſtitute an

an heyre to his Sonne, and did ſubſtitute *Titius*; afterwards the Sonne, who was mute, his Father being dead, married a Wife, and by that Wife had a Sonne. It was queſtioned, Whether the Subſtitution of *Titius* were of force? *Paulus* anſwered, That it was uſuall for the Emperour, to interpret his own grant in the way of favour to any man. But if the Will and pleaſure of the Emperour, be taken into conſideration, it may be conceived, that his grant was to that effect, only ſo long, as the diſability of the Sonne continued; For if he had given licence to a Father, to ſubſtitute to a Sonne who was then madde, all men would think, that the ſubſtitution ſhould be void, if the Sonne recovered his witts; for if it ſhould hold notwithſtanding, it would prove unjuſt, as depriving a man of good underſtanding, of the power to make a Will. And for the ſame reaſon, the Sonne having a Sonne, who properly ought to be his heyre, the ſubſtitution ought to be held as diſanulled; for it is no difference, whether the Sonne attaine to the ability of making an heyre, or begin to have an heyre whom the Law appoynts. Neither is it probable, That either the Father, or the Emperour, if they had thought on ſuch a caſe, would have done any thing for the diſinheriting of the Grand-child.

§ *Of one Subſtituted to the Survivor of two, who both dye at the ſame time.*

D. 28. 6. 34.

LVcius *Titius* had two young children, whom he made his heyres; and ſubſtituted *Seius* to him, that ſhould dye laſt of the two. It happened that they dyed both at the ſame time. It was queſtioned; whether the ſubſtitution of *Seius* did hold;

and

and to whom he might be reputed to ſucceed? *Aſiticanus* anſwered, That he ought to be underſtood ſubſtituted to both; becauſe he is underſtood to be laſt, not only that is after another, but he alſo, that hath none after him: as on the other ſide he is underſtood to be next, not only who is before another, but he alſo that hath none before him. *vid.* 42. D. *Eod.*

6 *Of a Subſtitution upon ſeverall Contingencies.*

D. 28. 5. 85.

Lucius Titius made his will after this manner, I doe ordaine, that *Seius* my brother, ſhall be the heyre of my whole eſtate, and if he ſhall refuſe to be my heyre, or, which God forbid, ſhall dye before he take upon him as my heyre, or ſhall have no Children, then my will is, that *Stichus* and *Pamphylus* my Bondmen ſhall be free, and equally my heyres. *Seius* the brother took upon him to be heyre to *Lucius Titius* the Teſtator; but when he took it upon him he had no Children. It was queſtioned, Whether in that caſe *Stichus* and *Pamphylus* were not made free, and became heyres to the eſtate; becauſe they were ſubſtituted, firſt if he refuſed, ſecondly if he dyed before he took upon him as heyre, thirdly, if he had no Children; or ſuppoſe they ſhall not be free, and heyres by vertue of the ſubſtitution, Whether ſome part of the eſtate, ought not to be conferred upon them? *Scævola* anſwered, That it was cleare, that the Teſtator meant in the firſt place, that his Brother ſhould be his ſole heyre; and therefore it cannot be thought, that he would have any man joyne, or ſhare with him: Beſides he provided ſo, that in caſe his Brother ſhould take upon him to be his heyre, the ſubſtitution of *Stichus*

and

and *Pamphylus* ſhould not take effect, as likewiſe it ſhould not, if before he had taken upon him to be heyre, he had dyed leaving children behind him; For it was the prudent care of the Teſtator, ſo to provide, that not only his brother, but alſo his brothers children ſhould be preferred in the inheriting the eſtate before his Subſtitutes.

SECT. III.

Of Deviſing in Truſt.

Deviſing in Truſt, is when one is made Heyre to anothers uſe, and truſted with the eſtate, after ſome time to be conveyed unto him.

1 *Of an Eſtate intended to one in truſt, deſcending to his Heyre.*

D. 36. 1. 46.

Seius Saturninus Admirall of the Britiſh Navie, in his Will, made *Valerius Maximus* Captaine of a Sally, his heyre in truſt, requiring him to convey over the eſtate unto *Seius Oceanus* his Sonne, when he ſhould attaine to the age of ſeaventeen years. *Seius Oceanus* dyed before he attained to that age. After his death *Mallius Seneca*, who was his Unkle, as being next of kin, demanded

demanded the eſtate; *Valerius Maximus* detained the ſame, conceiving, that, *Seius Oceanus* being dead, before he had accompliſh'd the age, at which the eſtate, by the Will of *Saturninus* was to be conveyed unto him, he was not bound to reſtore it to any other. *Javolenus* being conſulted thereupon, reſolved, That the eſtate, left in truſt for the good of *Oceanus*, belonged to him, to whom the other goods of *Oceanus*, after his death were due, and appertained; Becauſe for the nearnes of *Oceanus* his relation to his Father, it might be preſumed that the eſtate was intended ſimply or purely, not upon condition if he ſhould live ſo long; and that the time of performance, being prorogued to his age of ſeaventeen years, the eſtate in the mean time was rather, committed to the tuition of *Valerius Maximus*, then left unto his Sonne upon an uncertain condition, whereby his intention might be made void.

2 *Of Maintenance left in Truſt, to be raiſed out of Intereſt.*

D. 36. 1. 78. § 12.

C*Lodius* requeſted his Heyres, to reſtore to his Foſter-child *Gaius Mævius*, whatſoever ſhould be raiſed, by ſelling the third part of his eſtate, when he ſhould be fully fifteen years old; and in the mean time, they were deſired to maintaine him, out of the profits or Intereſt of the Mony. The charges of his maintenance, not riſing to ſo much as the profits or intereſt of the money; It was queſtioned, Whether the ſurpluſage were due unto *Gaius Mævius* when he came to the age of fifteen years? *Scævola* anſwered, That it was his opinion, The Teſtator intended the whole

whole benefit or profits of his portion ſhould come unto him.

3 *Of an Heyre in two Willes taking upon him from the latter, which was voyd in Law.*

D. 29. 2. 97.

Clodius Clodianus having made a Will legally, and therein appointed *Sempronius* to be his heyre, did afterwards likewiſe nominate him his heyre, in a Will which was not made according to Law. *Sempronius*, conceiving that the latter will was good, took upon him as heyre by vertue of that Will, which afterwards was found to be invalide: the eſtate growing into queſtion *Papinian* was of opinion, that *Sempronius* had renounced the benefit of the former Will, and had no right by the latter. *Paulus* maintained the contrary, That he which conceived the latter Will to be good, did not renounce the benefit of the former.

4 *Of cancelling one coppy of a Will, whereof there are more remaining.*

D. 28. 4. 4.

ONe who had compleatly made his Will, cauſed ſeverall coppies thereof, to be tranſcribed and to be laid up in the publique Office, where Wills are kept: afterwards he took from thence, one of the coppies, and cancelled it. It was queſtioned, Whether he had revok'd his will? *Papinian* was of opinion, That his Will being conteyned, and appearing entirely in another coppy, remaining in the Office, it was not revok'd or made voide

voide. *Paulus* admitts that it might be done with a purpose to dye without a Will: but they who were to succeed in that case, and carry away the estate from the written heyres, ought to prove that he had such a purpose.

TITLE

TITLE VI.

Of Legacies, and of a Reall Legacy.

A Legacy is ſomething due, as given or bequeathed to one in the laſt Will or Teſtament of another, and is either a Reall Legacy, or a Legacy, conſiſting in Right, or a Legacy in Truſt.

SECT. I.

A Reall Legacy is that which conſiſts in ſome certain ſpecies or body, as a thing moveable, *viz.* a Bond-ſervant, a Horſe, &c. or immoveable, as a Houſe, or ground &c. or which is determin'd by quantity, *viz.* by meaſure, weight, and number, as mony, corne, wine, &c.

1 *Of a Bondman Bequeathed, doubtfull between two, to be underſtood common to both.*

D. 30. 1. 36.

Lucius, having divers Bondmen, whereof ſome were ſo borne, others bought, and of either ſort, ſome were Weavers, gave to *Titia*: all the Weavers whom he had not given to any other in hi

his will, and to *Plotia* all his Bondmen borne, whom he had not given to any elſe. It was queſtioned, to whom thoſe did belong, who were both Bondmen borne, and likewiſe Weavers? *Labeo* ſaies, Becauſe it cannot appeare, which Weavers were not given to *Titia*, unleſſe it be known which were bequeathed to *Plotia*; nor doth it appeare, what Bondmen borne, were given to *Plotia*: The Bondmen borne, who were likewiſe Weavers, were excepted from neither Legacy, and therefore they ought to be common to both; for in this caſe it is all one, as if there had been no exception. But if he had bequeathed in this manner, I give to *Titia* all my Weavers, except my Bond-men borne, and to *Plotia* all my Bond-men borne, except my Weavers; They which were both Bond-men borne, and Weavers, had been given to neither of them.

2 *Of Error in the deſigning of Bondmen bequeathed.*

D. 34. 5. 28.

SEmpronius had two Bond-men, one called *Flaccus* a Fuller, and the other *Philonicus* a Baker; & in his Will he bequeathed to *Lucius* his Bondman *Flaccus* the Baker. It was queſtioned, Whether of the Bondmen were due? *Javolenus* ſaies, It muſt be granted, That, that Bond-man is due, whom the Teſtator intended; but if that cannot appeare, it is to be conſidered, Whether the Teſtator did well know the names of his Bondmen, and if he did, that then he was due whom he mentioned, by his proper name, although he erred in his profeſſion; and if he were not well acquainted with their names, then the Baker was underſtood to be be-

queathed, as if he had mentioned his profeſſion only, without his name.

3 *Of a flock of Sheepe, or the like bequeathed.*
D. 30. 1. 21. 22.

IF one bequeath his flock of ſheep, or his heard of Cattell; which flock, or heard, after the making of the Will, is increaſed at the Teſtators death: It is queſtioned, Whether more be due, then were at the making of the Will? *Vlpian* ſaies, The Legatory hath right to thoſe, which were added afterwards. *Pomponius* ſaies, If ſome ſheep or cattel dye, and others be ſupplied in their places, during the life of the Teſtator, it is ſtill the ſame flock, or heard; and if the flock or heard, be deminiſht, ſo that one ſheepe, or two only remaine, the Legatory hath right thereunto, although it then cannot be called a flock or a heard. As if a houſe be bequeathed, and is afterwards burnt, the ground whereon it ſtood is due.

4 *Of a Ground bequeathed, enlarged or diminiſhed.*
D. 30. 1. 24. § 2.

Lvcius in his Will bequeathed a Ground called *Titianum* to *Mævius*, and afterwards he layed or added a piece of another ground thereunto. *Pomponius* ſaies the Legatary may demand the whole, eſpecially if the piece of ground which was added, were his owne, at the time of making the Will. But if after the Will made, he ſeverd ſome part of the ground, called *Titianum*, and added it to another ground, It was doubted, Whether the Legatary had any right to that which was ſever'd? *Pomponius* ſaith, That which was ſevered, and added to another ground, belongs not to him, becauſe

becauſe it ceaſed to be part of that ground, which was called *Titianum*: Becauſe the names of grounds, of houſes, and the like, are not aſſigned by nature, but are impoſed by men, who are the owners, at their pleaſure.

5 *Of a Ground bequeathed, there being two of the ſame name, of different values.*

D. 30. 1. 39. § 6.

ONe, who had two fields, each of them called the *Cornelian* field, of different values, bequeathed one of them by the name of the *Cornelian* field. The Legatary demanding that of the greateſt value, and the heyre offering the leſſe; *Julianus*, being conſulted, ſaid, That in common underſtanding the heyre ought to be diſcharged by rendering that of the leſſe value, if the legatary could not prove, that the Teſtator intended that of the greater.

6 *Of a Third part of Goods bequeathed.*

D. 30. 1. 26.

Titius by his will, bequeathed a third part of his goods to *Lucius*. It was queſtioned, Whether the heyre were bound, to deliver the third part in kind, or the value of the third part. *Sabinus* and *Caſſius* were of opinion, That it was ſufficient for him to pay the value. *Proculus* and *Nerva* affirmed, That a third part of the goods themſelves might be demanded. *Pomponius* ſaid, That the caſe of the heyre, is more favourable, then of the Legatary; ſo that he may chuſe, whether he will deliver, part of the goods themſelves, or the value of them; which he ſaies is true, in ſuch goods as may be devided with-

out losse; but if they be such as cannot naturally be divided, or being divided, are not usefull, he is bound to give the value.

7 *Of Jewels bequeathed, afterwards altered.*

D. 34. 2. 6.

SEia having made *Publius Mævius* her heyre, bequeathed to *Antonia* a Jewell, containing a Pearle, with Emeraulds: afterwards shee took out of that Jewell the Pearle, and Emeraulds, and putting them into another Jewell, added thereunto divers other pretious Stones, by which it came to be of a farre greater value. It was questioned, Whether the heyre might be compelled, to sever the Pearle, and Emeraulds, from the reſt, and give them to the Legatary? *Marcellus* answered, That the heyre ought not to be compelled thereunto; For how, saith he, could that Legacy hold? when the thing bequeathed, doth not remaine in the same kind, but is, in a manner dissolved, and the will of the Testatrix, by the alteration, seems to have been changed.

8 *Of three Hundred Pounds bequeathed, with two Hundred Pounds deposited.*

D. 34. 5. 13.

LVcius left in trust with *Seius* two hundred pounds, afterwards in his Will he bequeathed as followeth, I give to *Seius*, with the two Hundred pounds which I left with him, three Hundred pounds. It was questioned, whether three Hundred pounds, or five Hundred pounds were due? *Iulianus* saies, That the summes severally taken, declare some thing certain, but as they are joyned in the Legacy, they are something doubtfull, but he

was of opinion, that both the ſummes were due, becauſe they were joyned together.

9 *Of a Legacy deſigned, in ſummes afterwards ſpent.*

D. 30. 1. 96.

Avrelius in his laſt Will, bequeathed as followeth, I will that *Pamphila* ſhall receive out of my eſtate, three Hundred pounds, that is, So much from my Factor, ſo much which I have in the Garriſon, and ſo much of ready mony, which I have lying by me: he lived many years after the Will was made, and diſpoſed otherwiſe of thoſe ſummes of mony. It was queſtioned Whether the heyre, who received what was ſufficient, out of the eſtate, were bound to pay the Legacy? *Iulianus* was of opinion, That it was moſt probable, that the Teſtator did rather ſignify unto the Heyre, how the Legacy might be paid, without any inconvenience to his eſtate, then limit his bequeſt conditionally, to thoſe ſums; and that therefore the three Hundred pound was due to *Pamphila*.

10 *Of a Legacy given to the Wife, of as much as to one of the Heyres, who had different ſummes.*

D. 32. 1. 29. § 1.

ONe made his Will, and diſpoſed of his eſtate, in different proportions to three heyres, and bequeathed to his Wife, as much as to one of his heyres. *Quintus Mucius*, and *Gallus* were of opinion, That ſhee ought to have as much, as he that had moſt; becauſe the ſummes of thoſe that had leſſe, were comprehended in his that had moſt. *Servius* and *Ofilius* were of opinion, That

ſhe ought to have no more, then he that had leaſt; becauſe the heyres were charged to pay the Legacy to her; and the words being directed to them, it was in their power, to pay ſuch a part as they thought fit.

11 *Of a Legacy, of what came to the Teſtator, out of another mans eſtate.*

D. 32. 1. 29. § 2.

SEmpronius who was one of the heyres of *Titius*, bequeathed, as followeth, What mony came unto my hands, out of the eſtate of *Titius*, I will that my heyre ſhall give ſo much to *Seia*. It appeared by *Sempronius* his books, that he had received an hundred pounds, which the heyre was ready to pay to *Seia*, if ſhe would ſecure him, or ſave him harmles, if any thing ſhould be recovered from him by others, as belonging to *Titius* his eſtate, *Labeo* was of opinion, That he was bound to pay, what appeared by the books, to have bin received out of the eſtate, and that *Seia* was not bound to ſave him harmles. *Alfenus Varus* was of the contrary opinion; Becauſe, that cannot be ſaid to come to the hands of one as heire, which in reſpect of that inheritance may be recovered from him: *Alfenus* ſaies, That *Servius* was of this opinion.

12 *Of the ſame thing twice Bequeathed to the ſame Perſon.*

D. 30. 1. 34. § 2.

SEmpronius in his Will bequeathed to *Titius*, his white Horſe, and to *Mævius* ten pounds: afterwards in the ſame Will he againe gave to them, the ſame Legacies. It was queſtioned, Whether the heyre,

heyre, by delivering the Horſe to *Titius*, and the ten pounds to *Mævius*, were to be freed? *Vlpian* anſwered, That if the ſame certain thing, as a Horſe, or the like, be bequeathed twice, it can be demanded but once; and the heire is diſcharged, if the Legatary receive, either the thing it ſelfe, or the value thereof. But if no certain thing, or body, but ſome what conſiſting in quantity, as a ſumme of mony, be ſo bequeathed, *Antoninus Pius* the Emperour hath determined, That the ſame might be paid againe, if by proofe it can be made appeare, that the Teſtator intended to double the Legacy: and the reaſon is evident, Becauſe the guift of the ſame thing, can be made good but once; but the ſame ſumme, if it be the Will of the Teſtator, may be made good oftner. It was thereupon farther queſtioned, If a hundred pounds (being a ſumme of mony) left in a certain cheſt, were twice bequeathed, in the ſame Will, whether it ought to be twice performed? *Vlpian* anſwered, That it ought not, becauſe that hundred pound, was a certain thing, and was of the ſame condition, as if he had bequeathed a certain Horſe, or a certain houſe. And it is then likewiſe queſtioned, If ſomething elſe beſides mony, as five ounces of gold or ſilver, be bequeathed twice, in the ſame will, What is due to the Legatary? It is anſwered, That it is of the ſame condition as a ſumme of mony: and it is concluded, that if any thing determined by number, weight, or meaſure, be bequeathed oftner, If it appeare to be the Teſtators will, it ought oftner to be performed.

12 *Of the ſame Legacy given in ſeverall Wills.*

D. 31. 1. 66.

Mævius made *Sempronius* his Heyre, and gave a moyety of a certain ground to *Titius* conditionally if he married *Lucia*. *Sempronius* likewiſe made his Will, and gave to *Titius*, a moyety of the ſame ground, upon the ſame condition. It was queſtioned, What was due, the condition being performed? *Julianus* ſaies, It may be conceived, That the ſame moyety was intended in both Wills; but it is not credible, that *Sempronius* would have that become due by his Will, which was due before (by the Will of *Mævius*). And although, it may be objected, That by the conſtitution of the Emperour, it is declared, that if the ſame thing be twice given it is ſufficient, if it be once performed; It may be anſwered, That, that conſtitution ſpeaks of that, which is twice given in the ſame will, not in ſeverall Wills: Againe, If a man bequeathed what he owes, it is reputed no Legacy in Law, unleſſe there be ſomething more in the Legacy, then was in the debt; and if the ſame thing only be given, upon the ſame condition, nothing at all accrues thereby to the Legatary.

13 *Of Legacies given contrary to a former Declaration in the Will.*

D. 32. 1. 22.

ONe in the beginning of his Will, declared, That if therein he bequeathed any thing twice, to the ſame man, it ſhould be but once performed. Afterwards, in the ſame Will, he wittingly gave to the ſame man ſeverall Legacies. It was queſtioned, Whether they were due? *Hermogenianus* anſwered, That if he had ſaid, he repented of the former Declaration, and thereupon willed, that the ſame man ſhould have ſeverall Legacies, they ought to be performed; Becauſe the latter declaration of his Will, is of more force then the former, and no man can in his Will, make a Law to himſelfe, but that he may recede from the ſame.

SECT.

SECT. II.

Of Legacies consisting in right.

A Legacy consisting in Right, is that which hath its existence from Law; as in respect of Persons, Freedome, and Power to choose &c. Or in respect of things; as the use, and profits of something, &c. Or in respect of Obligations and duties; as Annuities, Debts &c.

1 *Of Freedome bequeathed to two Bondmen, if they remained with the Testator at his death.*

D. 32. 1. 29. § 4.

LVcius, who had two Bondmen, called *Stichus* and *Dama*, in his Will provided thus. If *Stichus* and *Dama* at the time of my death shall be my Bondmen, Then I will that *Stichus* and *Dama* shall be free men, and have a certain ground between them. *Labeo* was of opinion, That if either of them, in his life time, were made free, or sould, neither of them should be free, nor have this Legacy. But *Tubero* affirmed, That he who remained his Bondman, at the time of his death should be free, and have the Legacy: and so

Celsus said, that the opinion of *Tubero*, was the more consonant to the Testators meaning.

2 *Of the Choyce of two things of severall names given, there being two of one name, of severall values.*

D. 34. 5. 1.

SEmpronius bequeathed to *Titius*, his ground called *Mævianum* (becaus it was bought of *Mævius*) or his ground called *Seianum* (which he bought of *Seianus*.) The ground which he bought of *Mævius* being of large extent, was divided into two parcels, whereof one was called *Mævianum* the great, and the other *Mævianum* the lesse. It was questioned whether *Titius*, having power to choose which he pleased, of that which was called *Mævianum*, or *Seianum*, might likewise choose as he pleased, either that which was called *Mævianum* the great, or that which was called *Mævianum* the lesse? *Papinian* answered, That it was to be considered, what proportion those two grounds held, with that which was called *Seianum*; and if the yearly value of the greater *Mævianum*, did but equall the rent of that which was called *Seianum*, he might make choyce of the greater; but if that did farre exceed, and the value of *Mævianum* the lesse were equivalent, the lesser only was left unto his choyce.

3 *Of the Choyce of a Legacy, not to be varied.*

D. 33. 5. 20.

TItius in his Will appointed, that *Lucius* should make choyce of some part of the furniture of his Dineing roome, as he should think fit. *Lucius* taking a view of all the furniture, signified that he

he then made choyce of ſuch pieces: Afterwards, before he had received the things, of which he had made choyce, he declared, that he would have ſome other things. It was queſtioned, Whether he had power to vary, having made his choyce? *Labeo* anſwered, That he had not power to vary; becauſe all the power of his election was determined in the firſt choyce, the property of the things choſen being inveſted in him, as ſoon as he had ſignified his aſſent.

4 *Of a Legacy of Bonds, to be underſtood, as when the Will was made.*

D. 32. 1. 34. § 1.

MÆvius made his two ſonnes *Titius* and *Gaius* his heyres, and by way of ſpeciall Legacy, bequeathed to *Titius* twenty of his Bonds, which he ſhould make choyce of. Afterwards he ſuffered *Titius*, to mannage his buſines, for the ſpace of ten years, before *Mævius* his death; in which time *Titius*, out of an hundred old debts of ſmall ſummes, contracted new debts by bond, for greater ſummes, ſo that almoſt the whole eſtate, was reduced into twenty bonds. It was queſtioned Whether he might make choyce of thoſe twenty bonds? *Scævola* anſwered, He ought to make choyce of no other, but ſuch, as the Teſtator had, at the time of making his will.

5 Of

5 *Of a Debt remitted by way of Legacy.*
D. 34. 3. 28.

TItius in his Will, declared, whatſoever *Seius* owed unto him, ſhould be remitted, by his heyre. It was queſtioned, Whether that only were remitted, which was due to the Teſtator, at the time of making the Will, or that alſo, which afterwards grew due for the uſe, and intereſt of the mony he owed? *Scævola* anſwered, That he was of opinion, that whatſoever was due by occaſion of that debt or obligation was remitted.

6 *Of an Annuall payment to a City.*
D. 33. 1. 6.

MÆvius by his laſt Will, gave an Annuall ſumme of mony, to the City where he dwelt; to maintaine yearly ſome publique exercis, which he would have ordered by his heyres: his heyres dying, their ſucceſſors refuſing to pay the annuall ſumme, becauſe the heyres were dead, who were appointed to order the publique exerciſes; It was thereupon queſtioned, Whether, in regard he had mentioned his heyres to that purpoſe, it was his meaning the Legacy ſhould be temporary during their lives, or perpetuall to continue after their deaths? *Modeſtinus* anſwered, The Legacy was perpetuall, to be paid unto the City.

7 *Of an yearly Legacy to the Officers of a Church.*

D. 33. 1. 20.

Attia, who had procured a faire, to be kept yearly neere her house, in a ground belonging to it, charged her Heyres, after her death to pay out of the rents of that house, and the profits arising by the fayre, ten shillings every fayre day, to the Priests, Sacrists, and Officers of a certain Church. It was questioned, Whether the Legacy were due only to the Priests, Sacrists, and Officers, who were at that time, when the Will was made, during their lives, or to be continued also, to their Successors? *Scævola* answered, That the Officers names were used, but the Legacy was to be understood intended to the Church; and that it was to be paid, as long as the fayre continued.

8 *Of an yearly Legacy given to uses afterwards disallowed.*

D. 33. 2. 16.

Ysimachus, to preserve his Memory with posterity, gave unto the Citty where he dwelt, ten pounds yearly, to be raised out of the rents of certain houses, for the setting forth of some publique shews, which afterwards were prohibited in that place. It was questioned, What should become of that Legacy? *Modestinus* answered, That whereas the use, for which the Legacy was given, could not be observed, It was not fit that the rents so bequeathed, should accrue unto the heyres of him who gave the same; and therefore the Magistrates of the City, together with the heyres, should consider

der and agree upon ſome other uſe, whereunto that Legacy might be converted, ſo that the Teſtators memory thereby might be preſerved.

9 *Of a Legacy given to uſes, no ſumme being expreſt.*

D. 31. 1. 30.

ONe in his laſt will bequeathed as followeth, I give to the Commonalty of *Graviſtan*, for repairing the high way, which is in their Territory, ſo farre as to the High-way leading to *Aurelia*. It was queſtioned, Whether the Legacy were good, no ſumme being named, or ſet downe? *Juventius Celſus* anſwered, That the words were ſomething imperfect, becauſe no ſumme was ſet downe; yet it might be gathered, that ſo much was intended, as was ſufficient to doe the worke, If the Teſtators mind be not underſtood otherwiſe, in reſpect of the ſmallnes of his eſtate; in which caſe the Judge is to determine, what is fit to be done.

10 *Of ſomething in one ground, being given to be imployed in another.*

D. 33. 1. 12.

Gaius Seius, having two Meadows onein a Village called *Pontia*, & the other in a Hamlet called *Lucia*, gave that in *Pontia* to *Mævia*, and that in *Lucia* to *Seia*: and afterwards he declared, That it was his will, That a quantity of Reed, and a quantity of Sallowes, ſhould be received yearly out of the Meadowe in *Pontia*, to be beſtowed, and imployed in the meadowe of *Lucia*. *Mævia*, who had the meadowes in *Pontia*, for ſome years allowed the Reed, and the Sallowes to *Seia*, who had the meadowe in *Lucia*: afterwards *Seia* being dead, it

was

was queſtioned, Whether the Legacy ought any longer to be performed? *Paulus* anſwered, That there was no ſervice created by the Will, neither perſonall for the party to pay during her life, nor ...l to be paid out of the ground, but only an yearly Legacy, which determined with the life of the party to whom it was given.

11 *Of a Deſire that a thing bequeathed, be not alienated, to a Stranger.*

D. 32. 1. 38. § 4.

Iulius Agrippa, a Centurion of the firſt ranke, deſired or left order in his Will, That neither his houſe, nor his Garden, in the Suburbs, ſhould be ſold, or alienated by his heyre, which was his own daughter, who left her daughter, and the Teſtators Grand-child her heyre, which dying, left the eſtate by her Will to a ſtranger. It was queſtioned, Whether the ſtranger ſhould inherit the ſame, or rather *Julia Agrippa*, unto whom *Julius Agrippa*, the firſt Teſtator was Unkle? *Scævola* anſwered, That the proviſion in the Will being no more, then a bare precept, or deſire, he ſaw nothing, but that a ſtranger might inherit the houſe and garden.

SECT.

SECT. III.

Of Legacies in Truſt.

A Legacy in Truſt is, when ſome thing is bequeathed to one to the uſe of another; to be reſtored after ſome time, or after his death to whom it was firſt bequeathed.

1 *Of a Legacy left in Truſt, Payd before the time appointed.*

D. 33. 1. 15.

TItius having put a hundred pounds in truſt, into the hands of *Gaius*, in his Will appointed, that after ten years, *Gaius* ſhould pay the ſame to *Publius*, who within few daies after demanded the mony, and receiving it, waſted it fooliſhly, and then dyed. It was queſtioned, Whether the heyre of *Publius*, might not ſue *Gaius* for the ſame, as being not paid, according to the will of the Teſtator?

Javolenus answered, If the Legacy were ordered to be paid after ten years, out of respect to the Legatary, as being not fit to receive, or unlikely to keep the same, and the Trustees paying it sooner, were occasion that it was wasted, he is by no means to be excused: but if the payment were deferred in favour of the party trusted, that in the mean time he might make use thereof, there is no cause why he should be sued, he having done more for the Legatary, then he was bound to doe.

2 *Of Persons, to whom a trust was intended, to be respected, in order as they are named.*

D. 31. 1. 77. § 32.

MÆvia by way of Trust, requested her Husband, that if any of his Children survive him, he would leave certain grounds, which had been her own, unto them; and in case no Children should survive him, to his or her kindred, or to some of their freed men. It was questioned, Whether, the Husbands Children failing, he might make choyce to whom amongst his, or her Kindred, or Freed-men, he would bestow these grounds? *Papinian* answered, That it did not belong to him, to make choyce, but that he ought to have respect unto the persons, according to the order, wherein they were mentioned, in her request.

3 *Of a Legacy, given for Thirty years, not to be determined by death of him, to whom it was given.*

D. 33. 1. 18.

LVcius Titius made *Sempronius* his heyre, and gave a ground, worth twenty pounds yearly, to *Mævius*, and willed that he ſhould pay to *Sempronius* yearly five pounds, from the time of his, the Teſtators death, untill Thirty years were expired. *Sempronius* dying after ten years, It was queſtioned, whether the five pounds yearly ought to be paid, for the remainder of the time, to the heyres of *Sempronius*? *Scævola* anſwered, That it ought to be paid unto them, unleſſe *Mævius* could make it appeare, that the Teſtator had relation to thirty years only, in caſe *Sempronius* ſhould live ſo long.

4 *Of a Legacy given to one at the age of fourteen, being voyd if dyed before.*

D. 36. 2. 22.

A Legacy was given to *Titius*, when he ſhould be of the age of fourteen years; he dyed before that age; It was queſtioned, whether the Legacy were due unto his heyres, When that time was come? *Pomponius* anſwered, That no right paſt unto the heyres, by his death, becauſe the Legacy depended not only upon a time, but it was uncertaine, whether that time ſhould happen; whereby the Legacy became conditionall, as if he had ſaid, If he ſhall live to the age of foureteene; and he that ceaſes to be, can never be ſaid to be of that age: neither is there any difference, whether it be ſaid, If he attaine, or when he attains to ſuch an age; in regard

the former, by way of condition, declares the time, the other by a time makes a condition; in both words a condition is implyed.

5 *Of a Legacy to be paid upon Marriage, not to be paid before she be Twelve years old.*

D. 39. 2. 30.

ONe gave a Legacy to his Niece, to be paid unto her as soone as she should be Married; the Niece made a shift to get a Husband, before she was twelve years old, and demanded her Legacy. *Labeo* said, That the heyre might hold his hands untill she was past her Pupillage; because She could not be held to be married, whom the Law did not hold fit, to have an husband.

6 *Of a Legacy given to one, who fell dangerously sick, transferr'd to another.*

D. 34. 4. 31. § 4.

CÆcilia in her last Will, gave a portion to *Priscillianus* her sonne; and afterwards, understanding that he was extreamly sick, and not likely to outlive her, declared, That in consideration thereof, she thought fit, that what she had given unto her sonne *Priscillianus*, should be divided betwixt her Husband *Januarius*, and her sonne *Marcianus*: she being dead, and her Will publish'd, *Priscillianus* was still alive, yet dyed, not long after. It was questioned, Whether the portion were due, to the Father in Law, and the Brother, or to the heyre of *Priscillianus*? *Scævola* answered, That he was of opinion, that if he dyed of the same sickness, or infirmity, it was due to them: Whence it is gathered, that if he had recovered, and dyed of another sick-

nesse,

neſſe, it had been due unto the heyre of the ſonne.

7 *Of a Legacy given to, or taken from an uncertain Perſon.*
D. 34. 4. 3. § 7.

Empronius having two friends, whoſe names were *Titius*; In his will gave a Houſe to *Titius*, and a Ground to *Titius*. Afterwards in that ſame Will, he declared, That what he had given to *Titius* ſhould not be performed. *Vlpian* ſaies, If it doth not appeare whoſe Legacy he would make voyde, both remaine good; as if one having given a Legacy to *Titius*, when there be two of that name, if it doth not appeare, whom he intended, it is due to neither.

TITLE

TITLE VII.

Of Performance and paiment, and of Reall Performance.

Performance and Payment, are the means whereby one is discharged, or freed from what he was obliged or bound unto; and is either Reall, Legall, or Reputed.

SECT. I.

Reall performance is; when the very thing which was due is Really performed or paid.

1 *Of Performance of something which is uncertaine.*

D. 45. 1. 106.

HE, who covenants to have a ground by such a name, (when there be divers grounds of the same name without any other note of distinction) to be given unto him, covenants for a thing uncertain; saies Vo-

valenus, That is for ſuch a ground as he who made the promiſe ſhall think fit to give; and it remaines in his diſcretion which he will give, untill that which he intended be delivered.

2 *Of Performance of ſomething or the value thereof.*

D. 23. 3. 10. § 6.

IF ſome things or goods be given in Dower, and an eſtimation of the value thereof be made; and it be afterwards agreed, that if the Marriage happen to be diſſolved, the things or goods themſelves, or the valew of them ſhall be reſtored. *Vlpian* ſaies, If it be added, Which the Woman ſhall chooſe; it ſhall be in her power to make choyce, either of the goods or of the value; or if it be ſaid, As the Husband ſhall like; it ſhall be at his choyce which he will reſtore: but if nothing be added concerning the choyce, yet it ſhall be in the Husbands power to reſtore the one or the other: For when one thing or another is promiſed, it is in the debtors diſcretion which he will make good; but if the things or goods be not extant, then the value, without all queſtion, ought to be reſtored.

3 *Of Reſtoring what was borrowed, when the value thereof is mutable.*

D. 12. 1. 22.

ONe lent unto another, twenty Hogsheads of Candy Wine, to have as many repaid; which being not done, or performed, a ſute was commenced for the ſame. The value, or price of thoſe Wines being mutable; It was queſtioned, At what value the Wines to be reſtored, ought to be

eſtimated, whether according to that which was the value, when they were delivered, or that which was the value, when they were ſued for, or that which might be, when they ſhould be adjudged? *Sabinus* anſwered, That if there were a time appointed, for the repaiment of thoſe Wines, the value was due according to that time; but if there were no time appointed, the value was to be allowed, as it was when the Wines were ſued for. The like was queſtioned, If the value or price were different, in reſpect of ſeverall places: And it was likewiſe reſolved, That if any place were agreed on, the value of that place was due; but if no place were aſſigned, the value ought to be paid, which was current in the place where the Wines were demanded.

4 *Of one who promiſed to give a Bond-ſervant in one Place, or to pay Ten pounds in another.*

D. 13. 4. 2. § 2. & 3.

IF a man be bound to pay, or performe ſomething at a certain place; if he be ſued for the ſame elſewhere, the Judge had power to take into conſideration, and give allowance for ſo much as it concerned the Debtor, rather to have performed, or paid it where it was due, then where it was demanded: Whereupon it is queſtioned, If one hath promiſed to give a certain Bondman at *Capua*, or to pay ten pounds at *Epheſus*, Whether he, to whom the promiſe was made, may not ſue in one of thoſe places, without reſpect to the other, or to any advantage, which the Debtor might have in making his choyce? *Scævola* anſwered, That ſome things which are tacitely reſerved in promiſes, are not alwaies in the

the Debtors power: What he will performé in ſuch a caſe is left to his diſcretion, but whether he will performe any thing at all, is not: and therefore to the purpoſe, He who promiſed, or undertook to doe or performe ſomething at *Capua*, or at *Epheſus*, if it ſhall be left to his diſcretion, where it ſhall be required of him, it may happen, that he cannot be ſued in any place; For as often as it ſhall be required, in one place, he may referre himſelfe to another, whereby it may come to paſſe, that it ſhall be in his power, whether he will performe any thing at all: and therefore he give a generall rule in ſuch caſes, That the Creditor may make choyce, where he will demand, and the Debtor where he will performe or pay, provided it be done, before any demand made; and therefore when the performance of ſeverall things, is referred to ſeverall places, of neceſſity it followes, that the Creditor having the election of the place, by conſequence hath the election of the thing, in reſpect of the place. Otherwiſe, if you allow the choyce to the Debtor, you deprive the Creditor of any action or remedy.

5 *Of the Effect or Conſtruction of Payment, when one payes a ſumme due in ſeverall reſpects.*

D. 46. 3. 1. 2. 4.

Lucius Titius owed to *Gaius Seius* ſeverall ſumms amounting to ten pounds, in ſeverall reſpects, and of different conſequences. He paid ten pounds, which was accepted, but not for any particular debt. It was queſtioned, To what debt it might be accounted? *Vlpian* ſaies, It was in the diſcretion of the debtor, to determine for what debt he paid it, & it ſhal be underſtood to be paid as he determind; becauſe

it is in his will to declare the condition of the payment, but if he doe not declare, or determine for what debt he paid it, it is in the diſcretion of the Creditor, to put it to account of what debt he pleaſeth, ſo that he put it to the account of ſuch a debt, as, if it were his own caſe, he would have firſt paid; Becauſe, it is moſt agreeable to equity, that the Creditor ſhould ſo deale with the debtor, as he would have been dealt withall himſelfe: And this ought to be done, when he receiveth the mony, ſo that it may be free for the Debtor, not to pay, as to the Creditor not to receive what is tendered, if either of them intend the payment in another reſpect: But if at the time of paiment nothing be declared on either ſide, it ſhall be underſtood to be paid, for that debt, the conſequence whereof is moſt prejudiciall to the Debtor; as, for a mans own debt, rather then for that, for which he is bound, as a ſurety for another man; for that which is under a penalty, rather than for that which is due ſimply: but if the debts be of equall conſequence, it ſhall be underſtood to ſatisfy that debt which was firſt contracted.

SECT.

SECT. II.

Legall Performance, or payment, is when that which was due is tendred according to Law, or is Legally remitted.

1 *Of Mony due, Tendred within a ſhort time after it was agreed to be paid.*

D. 45. 1. 135. § 2.

SEia at the requeſt of *Lucius Titius* bought certain Gardens convenient for him, and covenanted with him, that when ſhe ſhould receive the monies, which ſhe had laid out, with the intereſt for the ſame, ſhe ſhould aſſigne unto him all her right in thoſe Gardens; And, immediatly after, it was agreed betwixt them, That before the firſt of Aprill following, *Lucius Titius* ſhould pay unto her the whole ſumme, and receive the Gardens. Before the firſt of Aprill *Lucius Titius* tendred and paid unto her a good part of the mony laid out, and the intereſt, and within a ſhort time after that day, he offered himſelfe ready to pay the reſt, which ſhe refuſed to receive, and ſtill refuſeth. It was queſtioned, Whether he, having in that manner offered himſelfe ready to make payment of what was agreed upon, might ſue her to aſſigne over unto him the Gardens? *Scævola* anſwered, That he might,

if

if he offered himſelfe ready to make payment, in a ſhort time after the day appointed, in caſe ſhe had received no prejudice by his failing at that time; the conſideration whereof belonged to the cognizance, and determination of the Judge.

2 *Of Delay made after a tender of Mony which was due.*

D. 19. 1. 51. § 1.

ONe bought a ground upon condition, That he paid his mony for it, upon the Calends of *July*; and on that day, he who ſold the Ground, was ſome way the cauſe that the mony was not paid. Afterwards the buyer might have paid his mony, but neglected it. It was queſtioned, Whether the ſeller might inſiſt upon the breach of the condition? *Labeo* ſaid he might, Becauſe in the bargaine of ſale it was intended, that whenſoever it ſhould happen by the default of the buyer, that the mony was not paid, he ſhould incurre the penalty of the condition; and *Javolenus* is of opinion, that it is true, unleſſe he who ſold the ground uſed ſome fraud or deceit.

3 *Of Mony due, tendered to the diſadvantage of the Creditor.*

D. 45. 1. 122.

ONe, who had borrowed mony at Rome, to be paid in a Province farre remote, after three months, and had undertaken the payment in that place, within a few daies after at Rome repayred to the Creditor, and before witneſſe ſignified, that he was then, and there ready to pay the mony, deducting

deducting, what he had formerly given to the Creditor, in consideration of the use of his mony for such a time. It was questioned, in regard he had tendered the entire summe, which he was obliged to pay, Whether the Creditor might not, at the end of the three months, demand the mony, where it was undertaken to be paid? *Scævola* answered, It was in the power of the Creditor, at the time appointed to demand the mony, where he had covenanted to have it paid.

4 *Of Debts remitted in case the Creditor should Dye.*

D. 39. 6. 18. § 2.

Titias being sick, and having in her custody, bonds for debts, due unto her from *Septicius* and *Mævius*, with an intention to free them from those debts, delivered the bonds to *Ageria*, & required her, in case shee her selfe should dye, to deliver them up to *Septicius* and *Mævius*; but in case she should recover, to restore them to her againe: *Titia* dying, *Ageria* as she was desired, delivered up the bonds to *Septicius* and *Mevius*. *Lælia* daughter of *Titia*, and her heyre, questioned *Ageria* for those bonds, and threatned to sue *Mævius* and *Septicius* for their debts; but *Julianus* advised them, that if she sued, they might plead in Barre the act of *Titia*, and except against her unjust vexation.

5 *Of*

5 *Of Debts diſcharged by way of Legacy.*

D. 34. 3. 28. § 1.

Titius having made his will, therein bequeathed to ſome debtors, the releaſe, or diſcharge of what they owed. Afterwards, breaking up that Will, and reviewing it, he made another, in which he repeats the former bequeſt, in theſe words, And to whomſoever I have bequeathed any thing in that Will which I brake open, I will have it ſtand good, as all things elſe which were written therein. It was queſtioned, Whether the eſtate being ſetled according to the latter will, the debtors who were freed, in the former Will, might not prevaile to be diſcharged from certain ſumms, for which they grew indebted after the former Will was made; and, if the heyres ſhould demand thoſe ſummes, Whether they might not except againſt their unjuſt dealing? *Scævola* anſwered, That they were not diſcharged from thoſe ſummes.

6 *Of a generall Diſcharge by way of Legacy.*

D. 34. 3. 31. § 4.

ONe in his will wrote as followeth, Moreover I bequeath, and will have granted to *Gaius Seius*, who hath moſt amply deſerved from me, that nothing be demanded of him, or his heyres in any reſpect, whether it be due by writings, or upon account, or received as loane, or undertaken by way of ſuretyſhip. It was queſtioned, Whether that only were bequeathed and remitted, which was due at the time when the Will was made, or whether that alſo were not remitted, which might afterwards accrue to the advancement of the debts by way of uſe or intereſt? *Scævola* anſwered, That,

as the caſe is propoſed, It ſeemed that it was his intention by that Legacy to acquit and diſcharge him of whatſoever he owed.

7 *Of a Perſonall Diſcharge declared in a Will.*
D. 34. 3. 20.

ONe in his Will declared as followeth, My Will is that *Aurelius Sempronius* my brother be not ſued, in reſpect of any debt which he oweth to me; and that nothing be demanded of him, either for the principall or intereſt, as long as he lives: and farther I acquit the Houſe and Poſſeſſions called Caprelata engaged unto me. *Modeſtinus* anſwered, That if the Debtor himſelfe were ſued, he had a juſt Plea by way of exception to defend himſelfe; But the ſame would not hold in the perſon of his heyre, if after his death he ſhould be ſued for the ſame things.

SECT.

SECT. III.

Of Reputed performance and Payment.

Reputed Performance is, when that which was due, without delay, or fault of the Debtor, cannot be performed; as when the thing due is perished, and when it ceases to be in Commerce.

1 *Of Monies received to another mans use, and Lost without imployment.*

D. 3. 5. 13.

PAulus in his own person puts a case thus, A debtor of mine who owed me fifty pounds died; I adventured on the Administration of his estate, and laied out upon it ten pounds. Afterwards having put to sale some of his goods, I raised a hundred pounds, and put it up safe in a chest; This mony without any fault of mine was lost: The heyre of the Debtor appearing, and taking upon him the rest of the estate, a question grew, Whether I might demand the fifty pounds, which the deceased owed me, and the ten pounds which I laid out? *Julianus* answered, The resolution of the question, depends upon this consideration, Whether I were not in fault, in not employing the

the mony, as in paying my selfe, and other Creditors; For in that case I ought, not only to loose my fifty pounds, but also to make good the rest, unto the heyre, only deducting the ten pounds, which I laid out. But if there were just cause why I did not dispose of the mony, that then I ought to recover my debt of fifty pounds, and also the ten pounds which I laid out upon the estate.

2 *Of Goods lost by one who was fairely possest of the estate.* 3

D. 5. 3. 18.

ONe, who was in possession of an Estate, or Inheritance, selling goods, delivered the mony to a Scrivenor, in whose hands it was lost. It was questioned, Whether he were answerable for it, having no part thereof? *Labeo* was of opinion that he was answerable, Because at his perill he trusted the Scrivenor. But *Octavenus* said, There could be no more required of him, then to passe over to the true heyre, his right of Action. *Vlpian* said he liked *Labeo* his opinion; in case that he, who delivered it, were privy that he possest it unjustly: but if he were fairely, and lawfully possest thereof, *Octavenus* his judgement was rather to be followed.

3 *Of things periſhing in one mans poſſeſſion, which might have periſht in the poſſeſſion of the true owner.*

D. 5. 3. 40.

Paul. That whereas the Emperour *Hadrian* ordained, That if any one in poſſeſſion of an Inheritance were ſued, that he ſhould make good, what was extant, at the time when the ſute was commenced; It may fall out ſometimes to be very hard, For after a ſute is commenced, it may happen, that Bondſervants, Beaſts, or Cattell, may dye naturally. It is true, that *Proculus* holds it to be juſt, when particular things are ſued for; But *Caſſius* holds the contrary, and *Proculus* his opinion is right, if it be held of an unlawfull poſſeſſor, and *Caſſius* his is ſo alſo, touching one who is lawfully poſſeſt. For ſaies *Paulus* ſuch a poſſeſſor, ought not to make good, things which periſh naturally, neither ought he to be enforc'd, for feare of ſuch danger, by declining a ſute, unadviſedly to relinquiſh his right.

4 *Of the hazard of Monies due, loſt after a tender made.*

D. 46. 3. 72. & 102.

IF one, who owed ten pounds, made tender thereof to the Creditor, and he without any juſt cauſe refuſed to receive it; and afterwards the Debtor, without any fault of his, loſt the mony; *Marcellus* ſaid, If he be ſued for the ſame, he hath a juſt exception, although, it being afterwards demanded, he paid it not; Becauſe it is not Equity that he ſhould ſtand bound, the mony being loſt, who had

been

been freed, if the Creditor would have received it; wherefore, that ought to be held as paid, which the Creditor, out of his own fault, [illegible] to receive.

5 *Of the like Case.*

D. 46. 3. 39.

ONe, being ready to pay mony to his Creditor, by his appointment, left it sealed up in baggs, with a Gold-smith, untill it might be tryed. *Mela* saies, The hazard thereof belongs unto the Creditor, which *Africanus* agrees to be true; yet so that it be considered, whether the Debtor were any way in fault, that it was not presently tried, For then the case were alike, as if one was ready to pay mony, when the Creditor for some reason could not receive it: In which case it is not alwaies at the hazard of the Creditor; for, What if it were tendred at an unseasonable time, or in an unfit place? And agreeable to this he saies, it is, that if the buyer and seller of a commodity distrust each other, and leave in trust with a third person, the buyer his mony, and the seller his commodity, the losse of the mony shall beat the hazard of the buyer, if he made choyce of the person, with whom it was left, and so shall the commodity also; because the bargaine of sale was compleatly made.

6 *Of the hazard of Losse, where one thing, or another is promised.*

D. 18. 1. 34. § 6.

IF one buy a Bond-servant in this manner, It is agreed, that *Stichus* or *Pamphilus* is sold unto me. *Paulus* saies, it is in the power of the Seller, to

make good which he pleaſeth; as when one covenants for one thing of two in the ſame manner: but one of the two being dead, that which remaines ought to be given; and therefore the hazard of the firſt belongs unto the ſeller, of the latter to the buyer. But in caſe both dye together, the price of one ſhall be due to the ſeller; for one of the two lived ſome whiles at the hazard of the buyer: the ſame is to be ſaid, although it were at the buyers diſcretion, to take which he pleaſed, if that only were left to his diſcretion, to take as bought, whether of the two he pleaſed, and not ſo that he might chuſe, whether either of them ſhould be bought or not.

7 *Of a thing undertaken to be performed, which afterwards ceaſes to be in commerce.*

D. 45. 1. 83. § 5.

WHen one promiſed, or undertook to give ſomething which was of common uſe, or *Stichus* when he was a Bond-ſervant, he is diſcharged of his obligation, if, without any act of his, that thing becomes dedicated to holy uſes, or that bondman becomes a freeman; yea *Paulus* affirmes farther, That if afterwards by lawfull means, the thing conſecrated became to be in commerce, or of common uſe, or the Bond-man from a Free-man became againe to be a Bond-man, the former obligation ſhal not be reviv'd; becauſe in this caſe it doth not hold, that the cauſe ceaſing why it could not be given, it may now be given. For although he, who undertook to give a ſhippe being the owner thereof, if he take it in pieces, and out of the ſame timber, and planks, build it againe, begins to be obliged as before; becauſe it is now the ſame ſhip. And although

to

to the ſame purpoſe, that concurres which *Pedius* writes, *viz.* If I covenant to have a hundred veſſells of wine, to be delivered unto me out of a certain ground, I have liberty to exſpect, untill that ground may yeeld ſo much; ſo that if the ground yeelding ſo much, without the fault of him who undertook the performance thereof, it periſheth, I may exſpect a gaine untill it yeeld ſufficient, that what was undertaken may be performed: and that in theſe caſes according to the alterations of the things, the obligation may ceaſe, and be renued againe. But the matters in the caſe propoſed, as of a thing becoming conſecrated, and of a Bond-ſervant being made free, or of a different condition; Inſomuch that to make promiſe of a conſecrated place, when it ſhall prove to be prophane, or of a Free-man when he ſhall become a ſlave, is not admitted by Law; becauſe in their preſent condition they are not liable to any ſuch obligation, and thoſe things only are ſubject thereunto, which in their own nature may be performed at the preſent: and it ſtands not with civill, nor naturall reſpect, to attend the fall, or misfortune of a Free-man. For we properly trade and traffique in thoſe things, which are in common uſe, and may inſtantly be reduced under our power. As touching Wines, when they are undertaken to be given, no particular thing, which may faile, but ſomething in generall, which may at one time or other be performed, is undertaken. And for what is inſtanced in a ſhip, which is a particular thing; it is to be underſtood, That if it be taken in pieces, with a purpoſe, that out of the materialls thereof, ſome other thing ſhould be framed, although the purpoſe being changed, it be rebuilt againe, yet the firſt ſhip ceaſes to be, and that which is now built is another ſhip: but if the bords and planks of a ſhip,

be taken a ſunder, with an intention to repair the ſhip, the ſhip ceaſes not to be what it was; and the bords and planks being put together againe, it becomes the ſame ſhip, as when the timber and materialls of a houſe are taken downe, with an intention to be ſet up againe, they ſtill belong to the houſe; unleſſe they be taken down to the very floore, and then ſet up againe, for in that caſe it may be reputed another houſe.

PART II.

PART II.

TITLE I.

Of Common and Ordinary Judicature.

Judicature by way of Common and Ordinary proceedings is, when Causes of Common Right, are tried, and determined by ordinary Judges, in a Legall and usuall way; wherein are considerable, 1. The Persons, 2. The Proofes, 3. The Sentences.

SECT. I.

Concerning the Persons, as Judges, Parties, Councells, &c.

1 *Of a Minor proceeding as a Judge.*

D. 42. 1. 37.

A Question was made, Whether a sentence was good, which was given by one, as a Judge, who was under the age of twenty five years? And it seemed to some, That it much consisted with Equity, that the sentence should

ſhould be maintained, unleſſe he were under the age of eighteen years. *Vlpian* ſaid, That if in ſuch minority, he ſuſtained the place of a Magiſtrate, his proceedings ought not to be diſliked: Or if he were choſen a Judge, by conſent of thoſe, who knew he was not of perfect age, It may be well maintained, that the ſentence was good; and therefore if a Minor, being Prætor or Conſul, pronounce a ſentence, it ſhall be of force; For the Prince who conferred the Magiſtracy on him, hath enabled him thereunto.

2 *Of Judges having Juriſdiction, in Cauſes of a certain Value, or Summe.*

D. 2. 1. 11.

SOmetimes Juriſdiction, or Conuſance, is granted and limited to cauſes of a certain quantity, as under the value of five pounds. It is queſtioned, If one man at the ſame time, commence divers ſuits, before the ſame Judge, ſo limited, which being taken ſingly, are within his Conuſance, but taken altogether are beyond it; Whether they may be determined by the ſame Judge? *Sabinus*, *Caſſius*, and *Proculus*, were of opinion, That they might: and their opinion was confirmed, by the reſolution of *Antoninus* the Emperour. It was alſo queſtioned, If two perſons have cauſes of Suit one againſt another, one for a greater, the other for a leſſer ſumme; Whether he that ſues before a ſuperior Judge, in reſpect of the greater, may be reconvented before an inferior Judge, in reſpect of the cauſe of a leſſer ſumme? *Vlpian* ſaid, That both the cauſes were to be determined before the Judge that hath Conuſance

misance of the greater summe; That it be not in the power of a contentious adversary, to draw another from his proper Judge. Thirdly, it was questioned, If severall persons, claime distinct interests in the same thing, as in a Suit to divide a common estate, or to set out parts, in a common ground; Whether to the poynt of Jurisdiction, the particular interests shall be considered singly, or the whole businesse? *Ofilius*, and *Proculus* were of opinion, That the particular interests were considerable; because every one sues for his own part. But *Cassius*, and *Pegasus* held, that the whole businesse was to be respected, because the whole is brought into question: and it may fall out, that the whole may be adjudged to one particular. And *Vlpian* saies, That this opinion is more probable.

3 *Of alteration of Judges, appointed to heare the same cause.*

D. 5. 1. 76.

THe case was put, Whether the alteration of the persons, doe not alter, the Judicature, or Court; As for example, a Commission was granted to five persons, to heare and determine a cause; and the party sued, bound himselfe with sureties, to performe the judgement of the Court: the cause depending, some of those Judges dyed, or were discharged, and others were appointed in their roomes; Whether he stands bound to performe the sentence, given by the Judges newly appointed, and the rest? *Alfenus* answered, that the same judicature continued, not only if one, or two were changed but if the whole number of Judges, at severall times, were

were altered; and ſaies, it holds not only in this caſe, That the thing continues the ſame, although the parts be changed, but in many other bodies; For it is held the ſame Legion, or Regiment of Souldiers, although many of the firſt be gone, and others recruited in their roomes: and the people of a Country, are held the ſame, which it was an hundred years ſince, although none of that time remaine: And it is the ſame ſhip ſtill in reputation, although it hath bin ſo often repair'd, that there is not a plank or a bord left, into the place of which, there hath not been ſome new piece added: Nay, ſaies he, If any ſhould ſuppoſe, That by the alteration of the parts, the whole were not the ſame, it would follow by the ſame reaſon, That we our ſelves ſhould not be the ſame men we were ſome few years ſince; Becauſe as the Philoſophers affirme, The Atoms or inviſible parts of which we are compos'd, doe daily waſt, and ſpend, and others from abroad accrue in their ſteads; and thereupon concludes, that where the ſame ſpecies, or forme continues, the ſame thing or body ſtill remaines.

4 *Of Departure out of a Juriſdiction, after a Suit commenced.*

D. 2. 1. 19.

A young Woman living at *Bononia*, was ſued before the Judge of that place, and ſentence there was given againſt her. Afterwards ſhe was married to a Husband, who lived at *Mutina* out of that juriſdiction; It was queſtioned, Whether the Judge of *Bononia*, could put the ſentence in execution? *Vlpian* anſwered, That he might; becauſe the ſentence was given before the Marriage: Yea, he ſaies farther, That he is of opinion, that he might doe

doe as much, although ſhe had been married at any time, after the cauſe began to depend before him.

SECT. II.

Of Proofes to be made in Ordinary Proceedings.

1 *Of Proofes lying on the Defendants part.*

D. 22. 3. 12.

TItius gave fifty pounds to *Gaius* in his Will; afterwards he gave the ſame ſumme to him in a Codicill. It is conſiderable, whether he intended to double the Legacy given in the Will, or only intended but one fifty pounds, and mentioned it in his Codicill, not remembring, that he had put it downe before in his Will. It was queſtioned, On whoſe part it lay to prove the intention? *Celſus* ſaid, At the firſt ſight, it ſeemed reaſonable, that the Legatary ſuing, ſhould prove his intention to double the Legacy. But in truth, the proofe ſometimes lyes on the defendants part; for if one ſue another for a debt, and he anſwers that he hath paid it, he ought to prove the payment. And in this caſe, whereas the Legatary produceth two writings, and the heyre affirmes, that what is contained in the latter, is of no effect, it concernes him to prove the ſame.

2 *Of*

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2 *Of*

2 *Of proving Mony paid, to be Due, or not Due.*

D. 22. 3. 25.

ONe ſued to recover mony, as paid unduely to another man, and the queſtion grew, on whom it reſted to prove, the mony duely, or unduely paid? *Paulus* ſaid, The buſineſſe may be thus moderated, If he who is charged to have received mony not due unto him, denies the receipt, and he who charged him proves the receipt, without diſtinction, he who denied the receipt, if he will be farther heard, ought to prove, that what he received was due; For it were very abſurd, That he who denied the receipt of the mony, after that is proved, ſhould require his adverſary to prove that it was not due. But if at the firſt he acknowledge that he received ſuch mony, the preſumption makes for him, that it was due; Becauſe it is not to be conceived that any man, eſpecially a provident, and diſcreet perſon, would throw away his mony, or be careleſſe what became of it: and therefore he who affirmes, that the mony paid was not due, ought to prove, that either by errour, and miſtake, or elſe by fraud, or ſome probable occaſion, he was moved to pay the ſame.

3 *Of Proofe to be made by him who alleadgeth, what is contrary to common reputation.*

D. 22. 3. 15.

GAius *Seius* having Brothers, by a Codicill gave them Legacies, and *Mævius* his reputed ſonne, after his death ſucceeded him as heyre, and paid the Legacies to the Brothers, who received them, and gave acquittances for the ſame. Afterwards, the Brothers, pretending that they underſtood, he was not ſonne to *Gaius Seius*, queſtioned him for the eſtate, It was ſomewhat doubted, Whether they, having under their hands, acknowledged the Legacies paid by him, as ſonne to *Gaius Seius*, ought to be heard againſt him? *Modeſtinus* anſwered, That his condition, as ſonne of *Gaius Seius*, was not confirm'd by the acquittances, given for the receipt of the Legacies, if the contrary could be proved: but *Mævius* being reputed the ſonne of *Gaius Seius*, to prove the contrary, lay on the Brothers part.

4 *Of Monies mentioned to be due in a Letter.*

D. 16. 3. 26. § 2.

Titius wrote to *Sempronius*, That he had in his keeping twenty pound; belonging to him, out of which *Sempronius* owed him five, and five more were due to *Titius*, upon *Sempronius* his Fathers account: It was queſtioned, Whether this writing amounted to an obligation? *Paulus* anſwered, That the writing, being declaratory only, made no contract; but might be of uſe to prove the

the mony left in truſt in the hands of *Titius*; but whether it were of any force to prove the ſums due unto himſelfe, he ſaies the Judge, out of other circumſtances, may determine.

5 *Of Proofe contrary to a Writing Cancelled.*
D. 22. 3. 24.

A Writing or Bond, wherein was contained, that one was indebted to another, was found cancelled. It was queſtioned, Whether the Creditor were concluded thereby? *Modeſtinus* anſwered, That it was a great preſumption, that the debt was ſatisfied; but if the Creditor by evident proofes, could make it appeare, that it was not ſatisfied, he ought to be heard.

6 *Of proving a thing beyond Memory.*
D. 22. 3. 28.

ONe brought an action againſt his Neighbour, for an annoyance proceeding from a worke in his ground, ſuppoſed to be of late erection. The iſſue proved, whether within memory, or beyond? It was queſtioned, what ſhould ſerve for proofe? *Labeo* was of opinion, That it was ſufficient, if ſome could ſay, that they remembred when it was done, to prove it to have been done within memory: *Paulus* adds, That it is not requiſite to prove preciſely the day, or yeare, when it was done; becauſe it may happen, that ſome may remember, that it was done in their time, and not be able to ſay in what year. On the other ſide, If it be the common opinion, that none living had ſeen, or heard when it was done, nor at any time had heard other men ſay, that they had ſeen or heard, when it was done,

it

it ought to be ſuppoſed, that it was done beyond memory.

7 *Of Proofe by one Witneſſe.*

D. 33. 4. 14.

Theopompus, having a ſonne called *Caius*, and two Daughters, the elder *Attia*, who was beſtowed in Marriage, and the younger *Criſpina*, made all three his heyres equally: and afterwards in a Codicill declared as followeth, I deſire that my daughter *Criſpina*, be given in Marriage to one, whom my Kindred and friends ſhall approve; and for her portion, *Pollianus* knows my mind, how farre I intend to make her equall to her ſiſter *Attia*. *Criſpina* being Married according to her Fathers will, her Husband demanded as much, for her portion, as was given with her ſiſter *Attia*, when ſhee was married: *Gaius*, and *Attia* refuſing, the Husband produced *Pollianus* before the Judge, who being ſworne, depoſed, that it was the Fathers will, that his youngeſt Daughter, ſhould have as much for her portion, as he had formerly given with her ſiſter. It was queſtioned, Whether it ought to be ſo adjudged upon the depoſition of a ſingle witneſſe? *Scævola* anſwered, That the judge was to conſider, that the Teſtator in his Will, had referr'd himſelfe to the Teſtimony of the witneſſe; and therefore out of the eſtate common to the three heyres, he was to allow as much to the younger, as had been given to the elder.

SECT.

SECT. III.

Of Sentences given in Ordinary Cauſes.

1 *Of Judges diſſenting in their Sentences.*

D. 42. 1. 38.

IT was queſtioned, If the Judges, who are to give ſentence, are divided equally in their opinions, Which opinion ought to take effect? *Paulus* ſaid, That if they were Judges in a cauſe concerning Freedome, or for a Will, they ſhall carry it who are for freedome, or for the Will: and if it be a cauſe of another nature, they who are for the Defendant: but if there be a condemnation in different ſummes, *Julianus* ſaies, That the ſentence ought to hold, which is for the leſſer ſumme.

2 *Of divers Perſons condemned in the ſame Summe.*

D. 42. 1. 38.

FIve Perſons, were condemned in the ſame ſumme, *viz.* of a hundred pound. It was queſtioned, Whether the ſentence were diviſible, according to the number of the perſons, or indiviſible, ſo that each of them was liable to the whole? *Papinian* was of opinion, That it was diviſible, and the parties condemned were to pay only Equall parts.

3 *Of*

3 *Of a Sentence given betwixt two, not prejudicing a third party.*

D. 20. 4. 16.

CLaudius Felix, engaged the same ground to three Creditors, first to *Eutichiana*, secondly to *Turbo*, and thirdly to *Rufus*. *Rufus* the third Creditor, having gotten possession of the ground, *Eutichiana* commenced a suit against him, for the same, wherein shee was overthrown, and sate down by the sentence; Afterwards *Turbo* commenced a suit against *Rufus*, and was likewise cast therein; but he appealed before the Judges of appeale. It was debated, Whether *Rufus*, having prevailed against *Eutichiana* the first, ought not to be maintained in his possession against *Turbo* the second Creditor; or Whether *Eutichiana* being removed by a sentence, to which she submitted, *Turbo* should not succeed her, and exclude *Rufus*. It was alleadg'd for *Rufus*, that it was a rule, that if the third Creditor satisfy the mony owing to the first, he shall succeed in his roome, for so much as he paid: and some were of opinion, that in this case also, the third Creditor having prevailed against the first, he ought to be preferr'd before the second; but *Paulus* by no means allowed thereof: His reason was, That the sentence given against the first, could not prejudice the second, no more then if it had been given against the second, it should have prejudiced the first; And therefore he concludes, That the third Creditor, did not succeed in the place of the first, whom he removed, neither could the sentence given betwixt two parties, either availe, or prejudice any

elſe, who was not party to the ſute; and therefore, without any impeachment of the ſentence given againſt the firſt, the right of the ſecond Creditor remaines entire.

TITLE

TITLE II.

Of Arbitrement.

Arbitrement is, when causes of difference are referred to private Persons, by consent of the parties, or by appointment of the Ordinary Iudge, to be heard and determined, without Legall, and formall Proceedings, in which are considerable, 1. Touching the power of Arbitrators in generall. 2. Concerning differences betwixt Borderers, and Partners, and 3. betwixt Coheyres, &c.

SECT. I.

Touching the Power of Arbitrators in generall; as, concerning their choyce, their Commission, and Orders.

1 *Of a Reference made, with Power to assume an Vmpier.*

D. 4. 8. 17. § 5.

IF a difference be referred, by way of Compromise, to the determination of two Arbitrators, with power given to them, if they shall not agree, to assume a third man: *Vlpian* is of opinion, that such a reference is not good; be-

becauſe they may differ about the perſon: but if it be agreed, that they ſhall aſſume *Sempronius*, the reference is of force; becauſe they have no power to diſſent therein.

2 *Of all differences refer'd, whereof ſome are omitted in the relation.*

D. 4. 8. 43.

Lucius Titius and *Sempronius* agreed to ſtand to the award of a certain Arbitrator, concerning all differences betwixt them. But by Error, or Miſtake, *Lucius Titius* omitted to ſet downe in writing, ſome cauſes of difference on his part, and ſo the Arbitrator could determine nothing concerning thoſe. It was queſtioned, whether he were concluded, that he might not afterwards ſeek remedy, for thoſe matters? *Scævola* anſwered, He might, and not incur the penalty of the bond, to obſerve the award; But if thoſe matters were purpoſely omitted, for his own advantage, he may afterwards ſue, but he muſt pay the penalty.

3 *Of a Com-promiſe of all matters, to be determined at the ſame time.*

D. 4. 8. 25.

It was agreed in a Com-promiſe, or reference, that an Arbitrator ſhould, within a month, on the ſame day, pronounce of all differences referred unto him, and that if he ſaw cauſe, he might prorogue the buſineſſe to a longer time. The Arbitrator, within the time, delivered his judgement of ſome matters, and left others undetermin'd, prorogueing

rogueing the buſineſſe to a longer day. It was queſtioned, whether the parties were bound to ſtand to his award? *Labeo* anſwered, That they were not bound, only the prorogation was good: *Vlpian* approves his opinion, becauſe it is not in the Arbitrators power, to change, or alter, what was agreed upon in the reference, and therefore he ought to have examined all the differences, and at once, to have given judgement concerning all.

4 *Of a third Arbitrator abſent.*

D. 4. 8. 27. § 3.

IF three be choſen Arbitrators, the award of two of them is effectuall, if the third be preſent, otherwiſe not, ſaies *Celſus*, becauſe the reference is to more then two, and the third perſon, if he had been preſent, might happily have moved the other two, to have been of his opinion; But put the caſe, the third man abſent, was of the ſame opinion with the other two? *Pomponius* ſaies, the award is not good without him, becauſe they ought all of them ſeverally, to deliver their judgements.

5 *Of different Judgements, given by Arbitrators.*

D. 4. 8. 27. § 3.

IF there be divers Arbitrators, and they give different judgements, as if of fower two abſolve, and two condemne, the award is of no force. Hereupon *Julianus* puts a queſtion, If of three Arbitrators one condemne a party in fifteene pounds, another in tenne, a third in

five, in regard they all differ one from another, What effect ſhall the award take? He himſelfe reſolves it, ſaying, That the condemnation in five pounds, ſhall ſtand good; Becauſe he that condemned in fifteen, and he that condemned in tenne, doe both imply the ſumme of five pounds, that ſumme being included in both the other.

6 Of an Award given, and the Parties not required to ſtand to it.

D. 4. 8. 44.

A Controverſy grew betwixt *Caſtellianus* and *Seius*, about the limits and bounds of ſome grounds; and they choſe an Arbitrator, who ſhould determine the difference: he gave up his award in the preſence of the parties, and ſet out the bounds (but haply required neither of them, to ſtand to his award.) It was queſtioned, Whether, if *Caſtellianus* did not conforme thereunto, he were liable to pay the penalty, to which he was bound in the compromiſe? *Scævola* anſwered, That if he did not ſubmit, unto the determination made in the preſence of them both, he was liable to the Penalty.

SECT.

SECT. II.

Concerning Borderers and Partners, as to the ſetting out, of the Limits and bounds of Lands adjoyning, and the making partition of things which were held in Common.

1 *Of two owners in Common of one ground, one of them being ſole owner, of the next adjoyning.*

D. 10. 1. 4. § 7.

IF *Titius* and *Sempronius* be owners in common of one ground, and *Sempronius* alone of another adjoyning; It was queſtioned, Whether they might be admitted to come to a try-all about the limits of thoſe grounds? *Pomponius* ſaid, They could not be admitted; becauſe they, being partners, cannot become adverſaries in the ſame Cauſe, but are held as one, and the ſame perſon: neither whileſt they continue ſo, can they be admitted indirectly; becauſe he, that hath the ground ſole to himſelfe, and the ground common with another, may ſell his right in either of them; and then a try-all may be had.

2 *Of*

2 *Of a Tree growing upon two ſeverall grounds, coming to be divided.*

D. 10. 3. 19.

A Tree ſtanding, and growing in the confines of two grounds, belonging to ſeverall owners, as long as it continues in the place, belongs to both equally, for ſo much as ariſeth from the roots in their ſeverall grounds, and cannot come into diviſion, as a thing common betwixt them: but if it ſhall be blown downe, by the Wind, or cut downe, and ſever'd from the ground, it then becomes wholly, without diſtinction of parts, common to both, and may come into diviſion ſaies *Paulus*, the right of property being confounded betwixt them.

3 *Of Goods gotten by a common Servant, ſubmitted to diviſion.*

D. 10. 3. 24.

IF a Bond-man common to two Maſters, with the mony or means of one of them, gained ſomething, it cannot be denied, but what he hath gained, is common to both, ſaith *Julianus*: but if they come to a diviſion, of what is common betwixt them, he, out of whoſe mony, or means it was gained, ſhall be allowed to make his choyce thereof; becauſe it agrees with faire dealing, that any one may aſſume that ſpecially to himſelfe, which was gained out of his own mony or means.

4 *Of*

4 *Of charges laid out, to improve a common Ground, desired to be divided.*

D. 10. 3. 14.

ONe laid out charges to improve a common ground, which he conceived to be solely his owne; Afterwards he finds, that it was common to him with another. It was questioned, How he might have consideration for his charges, If any one should challenge, or clayme a distinct part of that ground? It is admitted, that that part might be detained, untill the charges were satisfied,& happily, if one claiming iuterest in common, sue to come to a division, in Equity he may be allowed the same; But it is farther questioned, if he who was at charges sell his part, whether the purchaser, may exspect the same consideration? And in case, one claime a distinct part, by way of property, it is granted, that he shall have the same power to retaine, untill satisfaction be given unto him, and it is reasonable saith *Paulus*, That he should have it in this case also: But if he bestowed charges, conceiveing the ground to be common to him, with *Titius*, whereas in truth, it was common to him with *Mævius*, whereas in the former case, he had only the remedy of retention, because laying it out, as upon his owne, he had no purpose to oblige any other, in this case he may have other remedy, because although he were mistaken in the owner, yet his purpose was to oblige the owner whosoever he was, no lesse then when one man in contemplation of another, doth busines for his use, and profit, whereby he hath a speciall Action against him, and therefore in this case also, when a com-

a common ground is improved, ſatisfaction ſhall be allowed in that ſuit, wherein things common are brought into diviſion.

5 *Of a Common ground, deſired to be divided, wherein one mans intereſt was pawned, the others is ſold.*

D. 10. 3. 7. § 13.

Titius and *Sempronius* having a ground common between them, *Titius* pawned his right and intereſt therein to *Mævius*, for a ſumme of mony, to be paid at a certain day: the day being paſt, and *Titius* his intereſt forfeited, *Sempronius* deſirous to have what was common betwixt him and *Titius* divided, profered to *Mævius*, his choyce, to take at the beſt value his right and intereſt in the ſame ground, or to give to him the beſt value, for what belong'd to *Titius*: *Mævius* out-bidding *Sempronius* he yeelded up his right and intereſt in the ground unto him: Then *Titius* tendred to *Mævius*, the mony which he had borrowed, and deſired his former right, and intereſt in the ground, to be reſtored unto him. It was queſtioned, Whether *Mævius* were bound to reſtore it? It was anſwered, (ſaith *Vlpian*) That *Titius* ought not to be heard, unleſſe he would alſo redeeme the intereſt of *Sempronius* in the ground, which upon bidding more mony was adjudged to *Mævius*; And it was ſhewed for reaſon, That if he who had right to part of a houſe had ſold it, and, before delivery thereof, were called to admit a diviſion; and upon offerture of him who had the other part, that he who would give moſt ſhould have both, that other part were adjudged to him, who had firſt ſold his part, then not delivered; it

was

was resolved, that he who had bought the first part, could not recover it, unlesse he would redeeme the whole; because the condition of him who first sold his right to a part, was much better now he having obtained the whole.

SECT. III.

Concerning Co-heyres, as when an Estate or Inheritance devis'd amongst them, is desir'd to be divided.

1 *Of Compensation in respect of things, of unequall value, divided.*

D. 10. 2. 52. § 2.

AN Arbitrator, chosen to divide an estate betwixt two brothers, thought it fit to allow some things in kind of unequall value to either of them, which he intended to supply, by adjudging mony proportionably in respect of those things. It was questioned, Whether he might make compensation after that manner? *Julianus* answered that he might.

2 *Of*

2 *Of charges beſtowed by a Father on his Sonne; in the way of Learning.*

D. 10. 2. 5.

A Father furniſhed his ſonne, being at his own diſpoſing, and travelling abroad, to attain Learning, with many things neceſſary for his maintenance, and furtherance in that way. It was queſtioned, whether the Fathers eſtate coming to be divided, thoſe allowances which his Father had given him, might not be computed into the Sonnes portion? *Vlpian* ſaid, That if the Father intended not to give him creditonly for thoſe things; but that out of his Fatherly affectiõ, he furniſht him; with the ſame, it will not ſtand with Equity, to defalcate any thing of his juſt portion, in reſpect thereof.

3 *Of a Sonnes portion Pawned in his Fathers life time.*

D. 10. 2. 39.

A Father, in his lifetime, divided his goods amongſt his two ſonnes; and in his laſt Will, he confirmed that diviſion, and provided, that what debts any of them owed, or ſhould incur, he alone ſhould undergoe the burthen thereof. Afterwards one of his ſonnes, with the Fathers privity, borrowed mony, and with his conſent, pawned ſome grounds, which his Father had aſſigned unto him, and held the poſſeſſion of the ſame, after his Fathers death. It was queſtioned, Whether, if the mony being unpaid, the Creditor ſhould ſell thoſe grounds, the Co-heyre upon a diviſion of the eſtate, were bound to allow any thing to him in reſpect thereof.

thereof. *Scævola* answered, That as the case was propose, he was not bound to allow him any thing.

4 *Of a Ground, wherein were Monuments of Ancestors, desired to be divided.*

D. 10. 2. 30.

ONe puts a case to *Modestinus* thus, There is a certain ground common to me, and a young maiden, my Co-heyre, who is under the age of twelve years; in which ground the reliques of mine, and her Ancestors are preserved: the Tutors of the young Maiden, have a desire, to sell that ground; I doe not like it: but being not able to purchase the whole, I am willing to retaine, so much, as may come to my share; and would, as much as in me lies, observe the respect due unto that place. I would gladly know, Whether I may not obtaine of the Arbitrator, appointed, to divide the estate betwixt us, that parting the rest of the inheritance, he may allot us severall portions in that ground? *Modestinus* answered, That he saw nothing, as the case was proposed, but that the Arbitrator appointed to divide the estate, might make partition of that ground as it is desired; and not meddle with the place where the Monuments are, but leave to the severall heyres, that entire right therein which belongs unto them.

5 *Of*

5 *Of Brothers agreeing to diviſion, without the Arbitrators conſent*

D. 10. 2. 57.

AN Arbitrator being appointed betwixt two Brothers, they agreeing made a diviſion among themſelves, as it becomed loving Brothers. It was queſtioned, Whether it were good, without the Arbitrators confirmation? *Papinian* ſaid, It was good, unleſſe by defect of age, it were inſufficient.

TITLE

TITLE III.

Of Maritine Judicature.

Maritine Judicature is, wherein Cauſes concerning Navigation and Trade by Sea, are diſcuſt; as 1. Concerning ſhipps, and freighting of ſhipps. 2. Concerning dammages done to ſhipps, and goods, or monies adventured. 3. Concerning Contribution, Fiſhing, &c.

SECT. I.

Of Shipps, and Freighting of Shipps.

1 *Of a Ship built with another mans materialls.*

D. 6. 1. 61.

Inicius was askt the queſtion, whether if one repaired his ſhip, with materialls belonging to another man, his right continued the ſame? To which he anſwered, It did. But *Julianus* ſaid, That if in building a ſhip he had done ſo, the right had been otherwiſe; becauſe the property of the whole ſhip ſhall be reckoned, from the right which any one hath, unto the keele, or bottome, which

which is the principall part, on which all the reſt is built.

2 *Of Profits due for another man Shippe.*

D. 6. 1. 62. & 7. 1. 12. § 1.

IF a ſhippe be in poſſeſſion of one, who knowes he hath no right thereunto, he may be ſued for ſuch profits, as might have been made by the true owner, by employment thereof: But it is otherwiſe, if any one in the ſame manner, have monies in his hands, which belong to another man; for he is not bound to pay intereſt for the ſame. *Papinian* ſaies, That although intereſt, or uſe mony in that caſe, cannot be demanded, yet freight may; Becauſe the only end of ſhipping, is the employment thereof, and therefore, if the ſhip be employed, the owner is liable to the danger, that may happen unto it: but mony is not intended, only to be put to uſe; and therefore he that puts it to uſe, runs the hazard, not the owner thereof.

3 *Of Monies lent to a Maſter to repaire his Ship.*

D. 14. 1. 17.

L*Vcius Titius* appointed *Stichus* Maſter of his ſhippe, who borrowed mony, and gave ſecurity for the ſame, as if he had received it, for the repairing of his ſhippe. It was queſtioned, Whether *Lucius Titius* were bound to repay the Mony, in caſe he who lent it, could not prove, that the Mony was imployed accordingly? *Africanus* anſwered, That the Creditor had ſufficient cauſe of action, if, when the mony was lent, the ſhippe was in that condition, that it was neceſſary, it ſhould be repaired: For as it were unreaſonoble, that the Creditor ſhould be

be bound, to take upon him the care, of the repairing the ſhip, and ſupply the owners roome, (which muſt be ſo, if it ſhould be neceſſary for him to prove that the mony was laid out upon the ſhip) ſo it ſtands with reaſon, that he be ſure that he lends his mony on ſuch an occaſion, as whereby the Maſters act may oblige the owner, which he cannot doe otherwiſe, unleſſe he knowes, that the mony borrowed was neceſſary, for the repaire of the ſhip; and therefore, if the ſhip wanted ſome repaires, and a farre greater ſumme was lent, than was needfull, the owner ſhall not be liable for the whole.

4 *Of Goods removed out of a ſhip that was hired.*

D. 14. 2. 10.

ONe hyred a ſhip, and conditioned to have his goods conveyed by Sea therein. The Maſter of the ſhip, not ignorant of the Merchants mind, without any neceſſary cauſe, removed thoſe goods into another ſhip; which ſhip together with the goods, were caſt away. It was queſtioned, Whether the owner of the ſhip, which was taken to fraight, were lyable for thoſe goods. *Labeo* ſaid, That the Merchant had juſt cauſe of action againſt the owner, or Maſter of that ſhip. But *Paulus* ſaies, It were otherwiſe, if both the ſhips were caſt away in the ſame voyage, and it ſo happened, without any fraud, or fault of the Marriners.

5 *Of a Voyage hindered by prohibited Goods.*

D. 19. 2. 61.

ONe let his ſhip for a certain freight, to goe a voyage from the Province of *Cyrene*, to *Aquileia* in Italy; which ſhip was laden with three thouſand Jarres of Oyle, and eight thouſand buſhells of Corne: but it happened, that the ſhip was imbargued nine months, in the province; and at laſt the lading was taken away, as forfeited. It was queſtioned, Whether the owner, or maſter of the ſhip might require the freight agreed upon? *Scævola* anſwered, That, as the caſe was propoſed, he might.

SECT. II.

Of Damages done to Ships: and of Goods, and Monies adventured at Sea.

1 *Of one Ship doing Dammage to another.*

D. 9. 2. 29. § 2. 4.

IF one mans ſhip fell fowle upon the Barque of another, whereby dammage was done to the barque. It was queſtioned, How, and by whom ſatisfaction was to be given? *Proculus* ſaid, If it were in the power of the Mariners, to have

re prevented the dammage, and by their fault it is omitted, they are liable to make ſatisfaction; becauſe there is little difference, whether they had hand in doing the hurt, or by not turning the helme, and by ſuffering the ſhip to fall foule, they occaſioned the ſame; But if, by breaking of a Cable, or want of Marriners in the ſhip, the dammage happened, the action lies againſt the Maſter of the ſhip. *Neſenus* ſaies, If one ſhip overrunne another comeing towards her, an action lies, as in caſe of dammage done purpoſely: but if the ſhip were driven on ſo violently, that her courſe could not be ſtaid, the owner is liable to nothing: and if any thing happened, by the fault of the Marriners, *Vlpian* is of opinion, that a penalty due by Law, for a fault or negligence, is ſufficient.

2 *Of Dammage done to the Tackle of a ſhip.*

D. 9. 2. 29. § 5. & 3.

IF any man cut the Cable, whereby a ſhip was faſtned, by occaſion whereof, the ſhip periſheth, the owner hath his remedy, ſaith *Vlpian*, by an action of the caſe. But if one ſhip, by the violence of the Wind, be driven athwart the anchor cables of another, and the Marriners of that ſhip, having no other means to get cleare, doe cut the cable, *Labeo* ſaies, that no action lies againſt them. *Labeo*, and *Proculus* hold the like, If a ſhip be forſed to fall foule, on Fiſhermens netts. But if it happen by default of the Marriners, they are liable to the penalty of dammage done by default: and in caſe they be bound to make ſatisfaction, for the netts broken, or ſpoyled, yet they are not liable for the value of fiſh, which may be ſuppoſed might have been taken, in thoſe netts, in caſe they had not been broken; Be-

cauſe, it is uncertain, whether any would have been taken, or no.

3 *Of a Merchant's ſervant, appointed to receive mony, giving longer time.*

D. 45. 1. 122.

Callimachus at *Beritum* in Syria, borrowed mony of *Stichus*, Servant, or Factor to *Seius*, living in Rome, to be tranſported, at the hazard of *Seius*, to *Brunduſium* in Italy; and covenanted to pay double intereſt for the ſame, for foure Months: and for performance, engaged all the goods he had laden at *Beritum* to be tranſported to *Brunduſium*, and all ſuch as he ſhould lade at *Brunduſium* to be brought back to *Beritum*. It was afterwards, more particularly agreed betwixt them, That when *Callimachus* was arrived at *Brunduſium*, within a month after, he ſhould, with ſuch goods, as he bought there, returne againe in his ſhip to *Beritum*; or if within that month he ſhould not relade his ſhip with goods, and ſet ſaile from thence, he ſhould forthwith pay the mony borrowed, with the full intereſt, as if the voyage were finiſht; and defray the charges of *Seius* his ſervant, ſent with him to receive the ſame, and to convey it to Rome: and this being propounded and required, by *Stichus* ſervant to *Seius*, was fully undertaken, and promiſed by *Callimachus*. The goods intended to be returned to *Beritum* being laden aboard the ſhip before the day limited, *Callimachus* having ſome occaſion of longer ſtay, *Eros* fellow-ſervant to *Stichus*, who was ſent along with him, giving his conſent, they put not forth to Sea, untill all the time

time limited was fully paſt; and afterwards in the returne, the ſhip and goods were caſt away. It was queſtioned, Whether *Callimachus* were bound, to make good the mony borrowed, and intereſt thereof to *Seius*? It ſeemed that he was bound; becauſe he did not ſet ſaile, from *Brundiſium*, untill after the time, that he ſhould have delivered in the mony, to be conveyed to Rome. And whereas it might be pleaded for him, that he ſtayed by the conſent of *Eros*, ſervant to *Seius*, ſent with him to attend that buſineſſe: To that it might be replied, That *Eros* had no other commiſſion, but to receive the mony at the time appointed, and to convey, or by exchange, to returne the ſame to Rome. *Scævola* anſwered. That upon the whole matter, as it was propoſed, *Callimachus* was bound to pay to *Seius*, both the mony borrowed, and intereſt.

4 *Of Intereſt of Monies adventured at Sea.*

D. 22. 2. 6.

AN Uſurer lent monies to a Merchant, at double intereſt, for which were engaged, the goods in a ſhip wherein the Merchant made his voyage; out of which, if the debt, and intereſt, could not be raiſed, It was agreed, that the Merchants goods laden abord other ſhips, and engaged for monies to other Creditors, ſhould likewiſe be obliged for ſo much, as ſhould remaine after the other Creditors were ſatisfied. The ſhip wherein the Merchant took his voyage, having goods enough to anſwer the whole debt, before the day, and place appointed for paiment thereof, was caſt away. It was queſtioned,

Whether the Uſurer might have recourſe againſt the goods in the other ſhip, in caſe any thing remained? *Paulus* anſwered, That in other contracts of lending mony, the hazard and loſſe of the thing lent, and what is engaged for it, belongs to the Receiver, not to the Creditor. But when monies are lent, upon a Sea voyage, It is intended that the Creditor, cannot demand any thing, unles the ſhip engaged, within the time prefixt for payment, arrive ſafely at the Port appointed: and therefore the condition failing in this caſe, the obligation for the principall, and conſequently for the intereſt was determined, although ſome of the goods, which were engaged for payment, were ſaved in other ſhips. But it may be then demanded, In what caſe might the Creditor have been relieved, in reſpect of thoſe goods? It was anſwered, In caſe the Merchants ſhip had ſafely arrived, and the goods therein had proved inſufficient, although that ſhip, after the time appointed for paiment, had been caſt away.

5 *Of Intereſt due although not* Demanded.

D. 44. 7. 23.

Mævius, the owner of a ſhip, being bound from Genua to Naples, borrowed mony of *Caius* at Genua, to be paid at Naples, to the ſervant of *Caius*, on the firſt of September following; and, as the manner is, covenanted by way of penalty, to pay a certain ſumme weekly, for the ſervants attendance. If the mony were not paid at that day, The ſervant at the day appointed, receiving part of the mony, demanded no more, at that time; and within a fortnight after, demanded the reſt. It was queſtioned, Whether *Mævius* were bound to pay

ny according to the Covenant, for that time, in regard nothing was demanded of him? *Africanus* answered, That what was agreed upon, by way of penalty, was due for that time; and it had grown on ace ſtill, although it had not been at all demanded; neither could the payment thereof be avoyded, unleſſe the mony had been tendered, and *Mævius* in no way faulty that it was not paid. Otherwiſe it might be ſaid, That if the ſervant, having begun to demand the mony, had afterwards by occaſion of ſickneſſe deſiſted, the penalty were not due.

SECT. III.

Of Contribution for loſſes ſuſtained in Sea voyages, and of Fiſhing, &c.

1 *Of Contribution to be made for Merchants Goods caſt over bord.*

D. 14. 2. 2. § 2.

MAny Merchants, having put divers ſorts of commodities abord a ſhip, wherein likewiſe were diverſe paſſengers; a violent ſtorme ariſing, It was found neceſſary to caſt out ſome mens goods: whereupon ſeverall Queries were made, as, Whether ſuch were bound, to contribute to the loſſe, who had no goods of burthen aboard the ſhip, but Pearles, jewells,

ells and the like, and if contribution were due for them, in what proportion was it to be made? Then, whether thoſe who had no goods, at all on bord, were bound to pay any thing, as free-men having their lives ſaved. It was reſolved, ſaith *Paulus*, That all ought to contribute, whom it concerned to have thoſe goods caſt over bord; becauſe the goods ſaved, owe that duty towards the goods loſt, yea the owner ought to be charged, in regard of his ſhip. Secondly that the proportion was to be ſet, according to the value of the goods, which were caſt away; but the lives of the paſſengers being free-men could admit no valuation, yet they were to pay for their cloaths, their rings, and all things elſe, which they carried about them, unleſſe ſuch as was taken with them, to be ſpent in the ſhip, as Victualls, or the like, which are exempted, becauſe if it fall out, that there be want in the voyage, they muſt neceſſarily be delivered up, to be ſpent in common.

2 *Of loſſes ſuſtained by a Ship, not liable to Contribution.*

D. 14. 2. 6.

A Ship ſurprized with a violent ſtorme at Sea, having her Maſts, Sailes, and Takling burnt with lightning, put into *Hippo* in *Africa*, and there being furniſht with ſuch neceſſaries, as could ſuddainly be gotten, ſailed to *Hoſtia*, and diſcharged her lading ſafe, and in good condition. It was queſtioned, Whether they, to whom the ſhips lading did belong, were bound to contribute any thing, to the loſſes of the ſhippe? *Julianus* anſwered, That they were not bound; for the

the charges were laid out rather to repaire the ſhip, than to preſerve the Merchants goods.

3 *Of Goods in a boat, caſt away.*

D. 14. 2. 4.

A Ship being heavy laden, entring into a ſhallow river, or Harbour, to avoid danger by eaſing the ſhip, ſome goods were put into a boat which was caſt away. It was queſtioned, Whether the goods in the ſhip ought to contribute to the loſſe of thoſe caſt away with the boat? *Callistratus* ſaid, That they were bound, as much as if they had been caſt out of the ſhip into the Sea; But if, after thoſe goods, were put into the boat, the ſhip with her lading had been caſt away, the goods preſerved in the boat, ſhould not have contributed to the loſſes in the ſhip; becauſe contribution is due only when the ſhip is ſaved.

4 *Of Exporting Goods, after a time limited for Exportation.*

D. 39. 4. 15.

C*Æſar*, when he had rented out the Quarries in Creete, out of which Whetſtones were digged, put out a Proclamation, wherein he prohibited, under penalty of forfeiture, that no man except his Farmour ſhould convey any Whetſtones, out of Creet, after the Ides of March; A Merchants ſhip laden with Whetſtones, before the Ides of March, ſailed out of the Port of Creet, and being brought back with croſſe Windes, into

into the ſame part, put out from thence, the ſecond time, after the Ides of March. It was queſtioned, Whether the ſhip and lading were forfeited, becauſe the goods were exported out of the Iland, after the time limited? *Alfenus Varus* anſwered, Although what was exported out of the harbour, was exported out of the Iſland, yet he that went out of the Iland, before the Ides of March, being driven back by a tempeſt, into the Harbour, and after that time ſet ſaile againe, ought not to be thought to have incurred, the penalty of the Proclamation; Becauſe, the whetſtones were exported out of the Iſland, when the ſhip the firſt time, put to Sea out of the Harbour.

5 *Of hindering one to Fiſh in the Sea.*

D. 47. 10. 13. § 17. & l. 14.

IF one will not ſuffer another to Fiſh, or draw a drag-net, in a publique Water, or ſtreame: It was queſtioned, Whether he might not be ſued in a cauſe of Injury? Some were of opinion, that he might be ſued. *Pomponius* ſaid, His caſe was like, as if one would not permit another, to make uſe of the common Bath, or publique Theater, who undoubtedly was liable to an action of Injury. It was queſtioned farther, Whether, if one did hinder another man from fiſhing before his houſe, or habitation, that were ground for an action of Injury, or no? For it is certaine, that the Sea is common, as the aire it ſelfe, to all men, and it hath been often reſolved, that no man ought to be prohibited, for taking fiſh in the Sea, no more, then from taking Foule, when he is in another mans ground, (although he be forbidden to come there,) yet it is received

received by common use and practice, saies *Vlpian*, although grounded upon no Law, that a man may hinder another from fishing before his house, or land; wherefore the use and practice being unreasonable, if a man be so hindered, he may bring his action of Injury; but if a man have a private right to a part, or Creek of the Sea, it is otherwise, and he may have an Injunction to maintaine his possession.

TITLE

TITLE IV.

Of Judicature concerning the Publique Treasury.

Iudicature concerning the Publique Treasury is, concerning such goods which belong to the publique Revenues, 1. Originally, 2. Or happening from Escheats and forfeitures, 3. Or derived from such Forfeitures and Escheats.

SECT. I.

Goods Originally belonging to the Treasury, are such Lands, and Revenues, as anciently appertained to the Prince, or Common-wealth.

1 *Of Rescinding a Sale, made on behalfe of the Treasury.*

D. 18. 5. 9.

Lucius Titius being indebted to the publique Treasury, the Officers thereof entred upon a ground of his, as forfeited, and sold the same for lesse than the debt amounted unto, whereupon, he repairing to the President, and offering himselfe ready to pay, what was

was due to the publique Treasury, the President declared, that the sale should be made voyde; and decreed, the ground to be restored to *Lucius Titius*: It was questioned, Whether upon the Presidents declaration, and decree, *Lucius Titius* ought to be held possest of the ground? *Scævola* answered, Not untill the Treasury were satisfied for the debt. and he who bought the ground, had his mony repaid.

2 *Of Publique grounds hired, let out to others.*
D. 49. 14. 47.

Æmylius Ptolemeus, hyred certain grounds, belonging to the publique Revenues, and afterwards let out the same, by parcells, for a greater value; He being questioned by the Officers of the Revenue, for what he received; *Paulus* said, It was unjust, and might prove prejudiciall to the Treasury, if the immediat Tenant should run the hazard of recovery from the under-tenants, and be forc't to pay more, than what he had agreed for: and thereupon it was resolved, that he should be sued for no more, then what he had agreed for.

3 *Of the Profits of publique grounds sold, arising within a time limited, for more to be offered.*
D. 49. 14. 50.

Valerius Patronius, Surveyer of the publique Revenues, proposed the sale of some grounds, to *Stalticius* at a certain price, if within three months, more were not offered for thē; within that time, a greater summe being offered *Stalticius* made it good. It was questioned, to whom the fruits & profits, received in the mean time, did belong? *Patronius* insisting

inſiſting upon it, that they belonged to the publique Revenue *Paulus* ſaid, That it was certaine, if they were received, betwixt the firſt propoſall, and the ſecond offer, they belonged unto the ſeller, and therefore to the Revenue; and it made no difference, that it was the ſame man, to whom the firſt propoſall of ſale was made, and who afterwards gave the price, as it was advanced. But in regard, both thoſe buſineſſes happened before the vintage, the caſe ſeemed to be altered; and it was held, that the fruits and profits belonged unto the buyer. *Papinian*, and *Meſſius* raiſed another opinion, Becauſe the grounds were let unto a Tenant, and it was hard to take from him the fruits and profits, before his time was exſpired, and therefore they held, that the Tenant ſhould receive the profits, and the purchaſer have the rent for that yeare, leaſt the treaſury ſhould be liable to give him ſatisfaction, in regard he did not enjoy, what he had contracted for: Whereupon, it was declared, That if the grounds were occupied by ſervants of the Treaſury, they ſhould all accrue unto the purchaſer; but if by Tenants, he ſhould receive the rent. *Tryphoninus* ſtarted a farther doubt, to wit, What ſhould become of the dry profits, as haply corne, or hay, which might be received before the ſale was perfected? And it was likewiſe reſolved, That if the day for payment of the rent happened not before, the purchaſer ſhould receive the rent, in lieu of thoſe profits alſo.

SECT.

SECT. II.

Of Eſtates liable to Eſcheats and Forfeitures.

1 *Of one who received mony out of the Eſtate, informing againſt the Heyre.*

D. 29. 5. 26.

Gaius Seius was indebted to *Titius*, in the ſumme of a hundred pounds, which was given to him by his Brothers Will, which he afterwards received of the heyres of *Gaius Seius*; and underſtanding that thoſe heyres had not proſecuted the authors of *Gaius Seius* his death, he informed againſt them, to make the eſtate forfeited to the publique Treaſury. It was queſtioned, Whether he, having received a hundred pounds, out of the eſtate, might be admitted to informe? *Scævola* anſwered, As the caſe was propoſed, he ſaw nothing but that he might.

2 *Of Proſecuting a Forfeiture, after the death of the Delinquent.*

D. 29. 14. 48. §7.

IF the heyre did not proſecute, the authors of the Teſtators death, the eſtate was confiſcable to the publique Treaſury: *Gaius Seius* languiſhing with ſickneſſe complained, that he was poyſoned by a Bond-man

Bondman, and ſo died. *Lucia Titia* his ſiſter, who was his heyre, neglected to proſecute the Bondman: and ſhe her ſelfe living ten years after, then dyed, ſhe being dead, an informer made diſcovery of the eſtate, as forfeited: It was queſtioned, Whether the offence died not with her? *Paulus* anſwered, That the penalty, not being corporall, but pecuniary, it was not extinguiſht, by the death of the unworthy heyre.

3 *Of the like.*

D. 46. 14. 9.

LVtius Titius made his ſiſter his heyre, of ſome part of his eſtate, and his Wife of the reſt. The ſiſter accuſed the Wife for poyſoning her Husband. Before the cauſe came to hearing, the Wife died. It was queſtioned, Whether the party accuſed being dead, the cauſe might be proceeded in, as concerning the eſtate which ſhe had gained? *Modeſtinus* anſwered, Although the criminall cauſe was determined, by the death of the party, yet the Officer of the publique Treaſury, might proſecute and prove the goods wickedly gotten, to be forfeited to the Common-wealth.

SECT.

SECT. III.

Of Eſtates queſtionable, after Forfeitures and Eſcheats.

1 *Of an Eſtate after death, not due upon Condemnation.*

D. 49. 14. 9.

Lucius made his mother his heyre, and deſired her, when ſhe died, to leave his eſtate to *Cornelius Felix*; the mother for ſome crime being condemned, the Officers of the Treaſury ſeized her whole eſtate: *Cornelius Felix*, interpoſing, pleaded, that his right was to take place before the Treaſury; becauſe the Law admits ſo much: but it was not granted, becauſe no right was to accrew unto him, untill after her death; and therefore in the mean time he was to be debarred.

2 *Of an Eſtate forfeited, for a falſe accuſation; and the firſt Mover freed.*

D. 48. 10. 24.

CAllimachus, in his Will, made *Maximilla* his daughter his heyre, for one twelfth part of his eſtate; and *Proculus*, with others, his heyrs for the reſt; of whom it was required, that they ſhould make *Athaletus* his Bond-man free, and give him a portion of his goods. *Athaletus*, before the Magiſtrate, in preſence of *Maximilla* the daughter, affirmed that he could prove, that the Will was forged, or falſified: whereupon *Maximilla* engaged her ſelfe, to juſtify that accuſation, againſt *Proculus*, and the Scrivenor, who wrote the Will. The cauſe coming to hearing, nothing appeared, wherefore they ſhould be condemned: and thereupon it was decreed, that the twelfth part given to *Maximilla*, ſhould be returned as forfeited, into the publique Treaſury. It was afterwards queſtioned, Whether *Athaletus* the Bondman, ought to receive any benefit by that Will. *Scævola* anſwered, That as the caſe was propoſed, he might.

3 *Of the forfeiture of One, not to be conſtrued in prejudice of Another.*

D. 32. 1. 27.

POmpeius *Hermippus* made his ſonne *Hermippus*, his heyre, for nine parts; and his daughter *Titiana* for a third part of his eſtate: and gave to either of them, certain grounds by way of Legacies. And moreover, his will was, that if his ſonne *Hermippus* ſhould dye without children, his daughter ſhould have other grounds. Afterwards in a Codicill

till, he gave his daughter ſome other ſpeciall grounds, and required her, that ſhe ſhould reſt her ſelfe contented with thoſe, in lieu of all her part of the inheritance, and legacies given in the Will. *Hermippus* the youngers eſtate was confiſcated; but *Titiana* demanded, what was bequeathed unto her. It was thereupon queſtioned, What the Fathers intention was? Whether he would have her relinquiſh her part of the inheritance only, or thoſe things alſo, which her brother was required to leave her at his death, if he had no children? *Paulus* was of opinion, That ſhe ought to relinquiſh all. But a milder judgement took place; which was, That ſhe ſhould relinquiſh only thoſe things, which ſhe was to receive during her brothers life; not thoſe things, which were to come unto her, after his death: and ſo the Court decreed.

4 *Of the Condition of a ſurety, when the Treaſury ſucceeds the Debtor.*

D. 46. 1. 72.

Varianius Antoninus procured, upon his Letter, *Aurelius Palma*, to lend a hundred pounds to *Julius Pollio*, and *Julius Rufus*, who were bound joyntly, and ſeverally to pay the whole ſumme. It happened, that the eſtate of *Julius Pollio* was confiſcated to the publique Treaſury: and *Aurelius Palma* dying without heyres, the publique Treaſury likewiſe ſucceeded in his eſtate. *Vranius* being ſued, by the Officers of the Treaſury, as having undertaken to *Aurelius Palma*, for the debt, Pleaded, that he was freed from his engagement to *Palma*, *Pollioes* and his eſtate being confounded in

one. *Paulus* was of opinion, That if there had been but one debtor, to wit, *Julius Pollio*, the plea had been good; there being no doubt, but the ſurety is freed, when the principall debtor cannot be ſued. But when two men are bound ſeverally, for payment of the ſame mony, and the Creditor becomes heyre to one of them, he ſaith, There is juſt cauſe to doubt, whether the other debtor be freed; or rather by confuſion of the obligation, the perſon only of that debtor, be exempted. And he is of opinion, That the Creditor ſucceeding one of the debtors his perſon is only freed, and the obligation remaines: whereupon he concludes, That the other debtor continues bound, and alſo he that is engaged on his behalfe. But although an action lies againſt the ſurety by Law, yet in regard *Vranius*, if he receive prejudice by his engagement, hath liberty to bring his action againſt either of thoſe, for whom he was engaged, If he be ſued, on behalfe of the Treaſury, he may except for ſo much, as *Julius Pollio* his eſtate was liable to him; and leave the Treaſury to take courſe, againſt the other debtor, to recover a moyety of the debt, if they were partners therein, otherwiſe the whole.

TITLE

TITLE V.

Of Judicature before the Prætor or Chancellor.

Iudicature before the Prætor or Chancelor is, when Remedies are desired to be afforded, which in the ordinary course of Iustice cannot be obtained; as, 1. *In Relieving Minors, and Debtors;* 2. *Preventing dangers;* 3. *And decreeing what is agreeable to Equity.*

SECT. I.

Of Relieving Minors & Debtors.

Reliefe of Minors and others is, when restitution is granted, against Acts done by them in Minority, or drawn by feare, or force &c. The relief of Debtors is by reducing of Creditors to conformity.

1 *Of an Act begun in Minority, compleated, or taking effect in full age.*

D. 4. 4. 3.

IF one contract with a Minor, and the event thereof falls out whē he is become of full age. It was questioned, Whether the beginning, or end of the businesse ought to be respected. *Vlpian* saies, It is resolved, That if any one, coming to full years, approve what is done in his Minority, there

there is no cauſe, why he ſhould be relieved, or reſtored againſt his own act: whereupon he relates, That *Celſus* was conſulted by *Fulvius Reſpectus*, the Prætor, in this caſe, A Minor, of the age of twenty foure years, commenced a ſuit in a cauſe of account, againſt his Tutors heyre; and the cauſe depending, after he came to the age of twenty five years, the Tutors heyre obtained a ſentence, wherein he was acquitted, Againſt which proceedings, and ſentence, the late Minor ſued to be relieved. *Celſus* thereupon adviſed the Prætor, That he ought not eaſily to be relieved, or reſtored; unleſſe it were contrived by the cunning of his adverſary, that he might be acquitted, when the other had attained to full age; for then the Minor might ſeeme, not only to have been over-reached, or deceived the laſt day, when the ſentence was given, but in the whole courſe of proceedings, which were ſo projected, that the ſentence for acquitting him, might be given, when the young man was of full age.

2 *Of Reſtitution againſt a third Perſon.*

D. 4. 4. 13.

A Minor ſold a piece of ground, and gave poſſeſſion thereof: and he that bought it, ſold the ſame againe, to another man. It was queſtioned, Whether the Minor might be reſtored, againſt the buyer in the ſecond place? *Labeo* was of opinion, That if the ſecond purchaſer knew, that it was firſt ſold by a Minor, reſtitution ought to be granted againſt him; but if he were ignorant thereof, and the firſt buyer were of ability to make ſatisfaction, he ought not to be queſtioned; and if the firſt were not of ability, then it was thought reaſonable

ble, that the Minor might be relieved againſt the ſecond, although he were ignorant.

3 *Of the Author or occaſion of Feare, againſt which, one ſues to be reſtored.*

D. 4. 2. 9.

BY the Authority of the Prætor, one of full years, might be reſtored, if by feare, or force he had yeelded, or agreed to any thing, prejudiciall to himſelfe. Yet *Pomponius* ſaies, Although the Prætors Edict ſpeaks generally of force, and feare, It is to be conſidered, from whom the force, or by whom the feare was occaſioned: and therefore if one, who was a Priſoner amongſt Pyrats, or Enemies, gave, or promiſed a reward to one, who ſhould free him out of their hands, he ſhall not be relieved, by that Edict; For although the promiſe, or guift, proceeded from his feare of danger, from the Pirats, or Enemies, yet he, to whom it was made or given, received it only, as a reward of his honeſt endeavour.

4 *Of a Releaſe, procured by Force, of a Debt Enforced.*

D. 4. 2. 12.

IF one by force compelled another to ſeale a bond, for payment of Mony to himſelfe; and that man, or ſome other, on his behalfe, compell him, who hath the bond, to ſeale a releaſe; although the releaſe were procured by force, yet *Pomponius* ſaies, the Prætor, in this caſe, ſhall give no reliefe; becauſe, as it was lawfull to reſiſt force with force, ſo he that by force is wrong'd, by force may help himſelfe.

5 *Of Reſtitution againſt the Heyrs of him, who hath gained from another, by force, or feare.*

5. D. 4. 2. 12.

THe heyre of him, who hath gotten any thing by force, or feare, although he be not liable to any penalty, yet is bound, (ſaies *Vlpian*) to reſtitution of what came unto his hands; for what was unjuſtly gotten, ought not to accrew to the heyrs advantage. But it is queſtioned, in caſe the heyre conſumes ſuch things, and dyes, Whether his heyre ſhall be liable to reſtitution? And it was reſolved, That he is liable; becauſe, it is ſufficient, that it once came to the firſt heyres hands, otherwiſe it might be ſaid, that he himſelfe, which conſumed it, was not afterwards liable: and the reſolution is moſt cleare, if the things were converted into mony, or any other profitable uſe: For ſo the Emperour *Antoninus Pius*, wrote to *Claudius Frontinus*, That the value of goods, belonging to an inheritance, might be required of the heyre, although they were not extant; Becauſe, his eſtate being improved by the procede of thoſe goods, although the ſpecies were changed, it was obliged as much, as if the goods themſelves were remaining.

6 *Of reducing Creditors to Conformity.*

D. 2. 14. 8. § 19. & 9. & 10.

IF a Debtor whoſe eſtate is not ſufficient to pay his full debts, agree with his Creditors, to accept part of their monies; if they all agree in common, and declare, with what proportions they will

ill be content, there is no doubt, but they are all ound, by the agreement. But if any diſſent, they, diſſenting, are not bound to ſtand to the Agreeent of the reſt, yet *Marcellus* ſaies, The Prætor may nterpoſe his authority, and confirme the agreement f the major part. And *Accurſius* ſaies, This courſe nds with Equity and reaſon; becauſe, if they doe ot all yeeld to looſe ſome thing, it may happen, ny waies, that none of them ſhall recover any ing.

7 *Of the Major part of Creditors, how to be underſtood.*

D. 2. 14. 8.

A Buſineſſe of Compounding, betwixt a Debtor and his Creditors, depending; and the Creditors being of different diſpoſitions; and eir debts of differēt quantities: It was queſtioned, ow the Prætor was to judge of a major part? *Vipi-* was of opinion, That he ought to reſpect, the ajor part, not according to the number of perſons, ut with conſideration had to the quantity of their ebts: but if the debts were of equall quantity, then, ccording to the number of the perſons; and if it ell out, that the number of perſons were equall, the ne for Compounding, the other againſt it, alhough there were no major part, he might confirm he conſent of the better ſort.

SECT.

SECT. II.

Of Preventing Dammages.

Dammages are prevented, by granting Injunctions not to proceed in a new work, which may be prejudiciall to others; and to secure one mans house or possession, from danger imminent, from the house or possessions of another.

1 *Of Warning to be given, to desist from a new Worke.*

D. 39. 1. 5. § 5.

IF one began a new work, which might be prejudiciall to another, and upon lawfull warning given doe not desist; the Pretor might cause him to demolish it, when it was finisht. Whereupon, it was questioned, When divers persons are concerned in an intended new worke, which might prove prejudiciall, To whom and by whom, warning is to be given? *Vlpian* saies, If the ground, or work belongs to severall persons, if warning be given to any one of them, it is sufficient, as if it were given to all: but if one of them proceeds in the worke; and the rest desist, they who desisted, are liable to nothing; for one mans act may not prejudice another, who acted not all: but, if there be many, who may be prejudiced by a new work,

work, it is not ſufficient for all, that one give warning to deſiſt; becauſe, it may happen that ſome have juſt cauſe, to forbid the work, others have not.

2 *Of one, who bought the ground, where a new Work was begun.*

D. 39. 1. 23.

Mævius, after warning given, not to proceed in a new work, ſold the ground, whereon the work was begun, to *Sempronius*; who knowing that ſuch warning was given, yet proceeded to finiſh the ſame. It was queſtioned, whether *Mævius* the ſeller, or *Sempronius* the buyer, were lyable to amends? *Javolenus* anſwered, That if warning be given, to deſiſt from a work begun, if it be afterwards finiſht, the owner of the ground, or work is liable; becauſe the warning is not perſonall, but reall, that is, it is in reſpect, of the thing, or work it ſelfe, not in reſpect of the owners intereſt, at that time: and that therefore, he only is bound thereby, who enjoyes the ground, or work, concerning which the warning was given.

3 *Of the Heyre of him, who proceeded in a new Worke.*

D. 39. 1. 22,

WArning being given to *Titius*, to deſiſt from a new work, He proceeding in building, and having finiſht it, died. It was queſtioned, Whether his heyre might be compelled to demoliſh it? *Marcellus* anſwered, That he might be compelled, to ſuffer it to be demoliſhed, but not to be at the charge thereof; becauſe, that

that kind of charge was impoſed on him, who contemned the Prætors Injunction, by way of penalty; and matters of penalty regularly fall not on the heyres.

4 *Of one required to ſecure another, who ſought not to be ſecured himſelfe, from danger.*

D. 39. 2. 13. § 11.

IF danger were feared from a ruinous building, the Prætor might cauſe ſecurity to be given, or the poſſeſſion of the building to be yeelded up. *Titius* having a ruinous houſe, and *Mævius* a houſe in good repaire adjoyning to it, *Lucius*, whoſe houſe was joyned to that of *Mævius*, deſired, that the owners of both, might ſecure his houſe from danger. It was queſtioned, Whether *Mævius*, whoſe houſe was in good repaire, might be compelled thereunto? *Vlpian* anſwered, That he was as well liable, as *Titius*; becauſe it might happen that the ruinous houſe, falling on that which was of good repaire, might occaſion that houſe, to beat downe the houſe of *Lucius*: and if it be ſaid, that there is no fault in the houſe of *Mævius*, being in good repaire, if the ruinous houſe, falling on it, ſhould occaſion loſſe, or dammage to the third. It is anſwered, That *Mævius*, the owner of the houſe in repaire, is deſervedly queſtioned; becauſe he omitted to provide for his own indemnity; which he might have done, by procuring *Titius* to have entered bond, to ſave him harmleſſe from any dammage, which might happen to him, by the houſe of *Titius*.

5 *Of*

5 *Of one, deſiring to be ſecured from dammage, who refuſed himſelfe to give ſecurity.*

D. 39. 2. § 11.

Titius having a ruinous houſe, adjoyning to the houſe of *Sempronius*, omitting to give bond to *Sempronius* to ſave him harmles according to the Prætors decree: *Sempronius*, by the Prætors authority, was put in poſſeſſion of the ruinous houſe: whereupon *Titius*, having another houſe in danger of the ſame, deſired that *Sempronius*, who was put into poſſeſſion thereof, might give him bond, to ſave his houſe indemnified. It was queſtioned, Whether he ought to doe ſo? *Iulianus* anſwered, That it was an unreaſonable thing, that he, who yeelded the poſſeſſion of his ruinous houſe, to be awarded from him, ſhould deſire him, to whom it was awarded, to doe that which he himſelfe had refuſed to doe.

6 *Of dammage, happening from one houſe to another, without fault.*

D. 39. 2. 43.

Lucius entred into a bond, to ſecure the houſe of *Sempronius* from any dammage, which it might ſuſtaine, from the houſe of *Lucius*. The tyles, or ſlats of *Lucius* his houſe, being by a ſtrong wind blown downe, upon the houſe of *Sempronius*, the tyles, or ſlats of that houſe were broken. It was queſtioned, Whether *Lucius* were bound to make good the loſſe? *Alfenus Varus* anſwered, That if the ſlats, or tyles fell down by reaſon of any fault, or inſufficiency in the building, he was bound to make the dammage good; but if the force of the wind were ſuch, that had the tyles been never ſo good, or ſufficiently laid, they would have been blown downe, he was no waies bound.

7 *Of*

7 *Of Dammage happening, before a Legall course was taken to prevent it.*

D. 39. 2. 44.

Titius, obſerving the houſe of *Sempronius*, adjoyning to his, to be very ruinous, required him extra-judicially, to give him ſecurity of indemnity from that houſe, which *Sempronius* refuſed to doe: and before *Titius*, could procure an order, from the Prætor, *Sempronius* his houſe failing, beat downe the houſe of *Titius*. It was queſtioned What remedy he might have? *Africanus* anſwered, That the Prætor could afford him none; becauſe it was his own negligence, that he did not ſooner ſeek remedy from the Prætor. But he ſaies, That if the Prætor having ordered, that ſecurity ſhould be given, and, for default therein, had awarded poſſeſſion of the houſe, from which the danger was feared, and the houſe happened to fall, before poſſeſſion thereof could have been taken by the complainant, he was of opinion, That he ought to have the ſame ſatisfaction, which he might have had, by taking poſſeſſion of the houſe.

SECT.

SECT. III.

Of Decreeing matters agreeable to Equity.

Matters are Decreed according to Equity, when what is desired is just, but cannot be allowed by strictnesse of Law; as, when men refuse to performe things commited to them in trust, or insist upon unconscionable pretences, and the like.

1 *Of Treasure hid in another mans Ground.*

D. 10. 4. 15.

ONe had Treasure concealed, or hid in another mans ground, and would not suffer him to digge for the same: that party could not be sued, to produce it, it haply, he knew not where it was. It was questioned, Whether he might be compelled, to suffer the other to search in his ground? *Pomponius* answered, That if he would take his oath, that he desired leave to search for it, without any prejudice to the owner of the ground, and will put in caution, to save him harmlesse, it stood with Equity that he should have a decree, or order, to digge, take up, and carry away the same.

2 *Of*

2 *Of Monies laid out to redeeme a Priſoner.*

D. 3. 5. 21.

THree Romans being taken priſoners in warre, by the Portugals one of them was let goe, upon condition, that he ſhould bring mony, for ranſome of himſelfe, and of the other two; and in caſe he ſhould not returne, it was agreed, that the other two ſhould be anſwerable for him. He neglecting to returne, the other two, at length, were forced to pay his ranſome. It was queſtioned, What remedy they might have againſt him? *Servius* anſwered, That the Prætor in Equity, ought to condemne him, for what they had laid out on his behalfe.

3 *Of Intereſt demanded for Mony depoſited.*

D. 16. 3. 24.

L*Vcius Titius*, by his Letter, ſignified to *Sempronius*, that he had received from his ſervant, a hundred pounds, as committed to his keeping; and that he would be ready, when, and where he ſhould require, to reſtore the ſame. It was queſtioned, Whether *Sempronius* might demand Intereſt with his mony? *Papinian* anſwered, That it is certain, that an action, for a thing depoſited, did lie in this caſe; becauſe the words, Committing, or Commending to his keeping, doe ſignify nothing elſe, but depoſiting; which is true, if it were done with an intent, that the ſame numericall mony ſhould be reſtored: but if it were agreed, that ſo much in quantity, ſhould be repaid, the buſineſſe doth ſomething differ from the nature of a thing depoſited; and in that caſe, although an action for a thing

thing depoſited doth not lie, yet it ought eaſily to be yeelded, that intereſt ſhould be due for the mony. He addeth, That it is true, that in a buſineſſe of this kind, the Judge may determine what is fit, as well as if the parties had expreſly agreed thereupon: but he ſaith, It is both againſt the nature of a thing left in truſt, and faire dealing, to require intereſt of him, who doth a curteſy, in keeping what is truſted with him, before he hath made any delay in delivery thereof.

4 *Of an Heyre, made in Truſt, to convey the eſtate to the Teſtators Sonne, or Mother.*

D. 36. 1. 25.

Sempronius made *Titius* his heyre, and required of him, that what he ſhould receive of his eſtate, he ſhould, as ſoon as might be, convey unto his ſonne; or if his ſonne ſhould dye, before it was done, unto his ſonnes Mother. After the death of *Sempronius*, before *Titius* took upon him as heyre, the ſonne died. It was queſtioned, Whether the eſtate were due unto the Mother, or to the heyre of the ſonne? *Julianus* anſwered, That if the ſonne dyed before that time, when the eſtate ought to be conveyed unto him, the right was devolved unto the Mother; but if he dyed after that time, by Law it belonged to the heyre of the ſonne. But whether it were the Teſtators meaning, that if the ſonne dyed, at any time, before the eſtate were made over unto him, it ſhould be conveyed, rather to the Mother, then to the heyres of the ſonne, the Prætor ought to determine, taking into his conſideration, the quality of the Mother, and of the heyre of the ſonne. But *Marcellus* ſaid, That it is

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D. 36. 1. 25.

Sempronius made *Titius* his heyre, and required of him, that what he ſhould receive of his eſtate, he ſhould, as ſoon as might be, convey unto his ſonne; or if his ſonne ſhould dye, before it was done, unto his ſonnes Mother. After the death of *Sempronius*, before *Titius* took upon him as heyre, the ſonne died. It was queſtioned, Whether the eſtate were due unto the Mother, or to the heyre of the ſonne? *Julianus* anſwered, That if the ſonne dyed before that time, when the eſtate ought to be conveyed unto him, the right was devolved unto the Mother; but if he dyed after that time, by Law it belonged to the heyre of the ſonne. But whether it were the Teſtators meaning, that if the ſonne dyed, at any time, before the eſtate were made over unto him, it ſhould be conveyed, rather to the Mother, then to the heyres of the ſonne, the Prætor ought to determine, taking into his conſideration, the quality of the Mother, and of the heyre of the ſonne. But *Marcellus* ſaid, That it is

agreeable to the Will of the Teſtator, that whenſoever the ſonne ſhould dye, whether before, or after the right to the eſtate accrued unto him, it ought to be transferred unto the mother, if it were not actually conveyed: and that ſo it hath been practiſed.

5 *Of a Releaſe procured by fraud.*

D. 2. 14. 35. & 36.

Titius, *Mævius*, and *Seius*, three brothers, divided their Mothers eſtate between them, and by writings gave each other releaſes. Afterwards *Mævius*, and *Seius* who were abſent, at their Mothers death, found *Titius* had conveyed away, and concealed out of the Inventory, by which the diviſion was made, a ſumme of gold. It was queſtioned, Whether they might not ſue *Titius*, notwithſtanding they had given him releaſes? *Modeſtinus* anſwered, That they might: and if their releaſes were pleaded againſt them, they might reply concerning the fraude.

6 *Of the Sale of a Ground, Warranted as the Seller poſſeſſed the ſame.*

D. 19. 1. 39.

Alfenus ſold a ground, which he ſhewed to *Paulus*, and warranted it, as he poſſeſſed the ſame: and being privy that ſome part of that, which he ſhewed to *Paulus*, did not belong to himſelfe, concealed the ſame. It was queſtioned, Whether he were bound to make good the ſale for ſo much as he ſhewed? *Modeſtinus* anſwered, That he was bound; becauſe the generall words [As he poſſeſſed] extend not to what he knew to be otherwiſe:

wiſe: For elſe *Paulus* was over reacht, or deceived, who, if he had known any part thereof, to belong to any other, would not have bought the ground, or not have given that price for it; which opinion he maintaines, the rather, becauſe by ancient Lawyers, it hath been determined, That if one ſelling a ground, did warrant it, except ſuch ſervices as were due, if any were due, and knew of ſome ſervices due, and did not acquaint the buyer therewith, he ought to give ſatisfaction for the ſame; Becauſe a generall exception extends not to that, which the ſeller particularly knew, but only to thoſe things which he was ignorant, and could not certify the buyer.

7 *Of Grounds ſold, the Meaſures miſtaken.*
D. 19. 1. 42.

ONe who had two grounds, ſold them ſeverally, to the ſame perſon; and eſtimated them, the one at two hundred acres, the other at a hundred: he who bought them, upon meaſure, found, that which was eſtimated at two hundred acres, to want ten, and he that ſold them proved, that the ground eſtimated at a hundred, contained a hundred and ten acres. It was queſtioned, What ſatisfaction was to be given? *Labeo* was of opinion, That although what was wanting in one, was ſupplied in the other, the ſeller was bound to make good that which was wanting. *Paulus* conceived, That if the purchaſer brought his action, he might be relieved by the exception of unconſcionable dealing; and gives inſtance of one, that ſold a Copps, and a Vineyard, as of equall quantities, and what wanted in the Copps, was ſupplied in the Vineyard; in which caſe, if there were any difference, betwixt

the one and the other, it was for the buyers, not the ſellers advantage; and concludes that in ſuch caſes, the loſſe in the one ſhould be compenſed with the gaine in the other, ſo that the buyer be not any waies prejudiced, in the quality, or goodneſſe of the ground; for in that reſpect, he ought to have ſatisfaction.

8 *Of a Covenant not to remove a Tenant.*

D. 19. 2. 54. § 1.

Titius did let a houſe to *Seius*, for ſeaven years, at an yearly rent, and it was covenanted betwixt them, That if *Titius* ſhould remove *Seius*, within the terme, he ſhould by way of penalty pay to him ten pounds; and if *Seius* ſhould quit, or leave the houſe within that time, he ſhould forfeit to *Titius* the like ſumm. It happened, that *Seius* paid no rent in two years. It was queſtioned, Whether *Titius* might not remove him, without incurring the penalty? *Paulus* anſwered, Although nothing were mentioned in the agreement, about paiment of the rent, yet it muſt be the intendment of the agreement, that *Seius* paying his rent, and uſing the houſe as he ought, ſhould not be removed: and thereupon if *Seius*, upon that occaſion being removed, ſhould ſue for the penalty, *Titius* might uſe the exception of unconſcionable dealing againſt him.

9 *Of*

9 *Of Rent to be abated, for improving the ground.*

D. 19. 2. 61.

A Tenant, which was no waies bound by his leaſe, at his own coſt planted a Vineyard, in the ground which he held; by occaſion whereof the Landlords rent was improved, to the value of ten pounds by the yeare: ſome rent being unpaid, the Landlord put him out, and ſued him for the rent. It was queſtioned, Whether he might not require allowance for his improving the ground? *Scævola* anſwered, That if no allowance were made unto him, and the Landlord ſued him for his rent, he might oppoſe the exception of unconſcionable dealing, or ſuing contrary to reaſon.

TITLE

TITLE VI.

Of the Emperour, or Princes Audience.

Iudicature before the Emperour, or Prince, is when they in person heare causes, which they either determine themselves, or give direction for the determination. As 1. *Generally in all causes of Law and Equity,* 2. *Specially concerning causes Testamentary,* 3. *In Reforming or confirming sentences given by inferior Iudges.*

SECT. I.

Of Causes in generall both of Law and Equity.

1 *Of the Fathers Fact, not debarring the Sonne from a benefit derived from the Grand-father.*

D. 37. 14. 17.

WHen a Bondman was made free, his Master became his Patron, and amongst other benefits, had a right to succeed, in part of his estate, when he dyed, which right he forfeited, in case he accused his freed man, of any capitall crime, *Marcus Antoninus* the Philosopher, and *Ælius Verus*

Verus being Emperours, it happened that the Grandfather having made his Bondman free, his ſon called the freed man in queſtion for his life, and failing to make good his accuſation, the freed man was acquitted. And afterwards both the accuſer, and the freed man died; whereupon the grand-child of him, that made the bondman free, and ſonne of him who had accuſed him wrongfully, claimed part of the freed mans eſtate. The caſe being brought before the Emperours, They declared, that they found it doubted, amongſt experienced Lawyers, whether the grand-child, as Patron, ought to ſucceed in that caſe; and that *Proculus*, a man of eminent judgement, was of a contrary opinion, and that they themſelves, had given judgement otherwaies, in the caſe of *Caſia Longina*, which ſentence was approved, by their friend *Volucius Mæcianus*, a man of well grounded knowledge, who profeſt, That if he had been judge, he ſhould have given ſentence the ſame way, but afterwards, upon mature deliberation, adviſing with the ſame *Mæcianus*, and other Lawyers their friends, (for ſo the Emperours were pleaſed to grace men of that quality) it appeared unto them, That neither by the words, nor by the intent of the Law, the Nephew ought to be excluded, by his fathers act, from that right, which deſcended unto him, by his Grand-fathers making the bondman free; and That many learned authors of the Law, and amongſt them, their friend *Salvius Julianus*, a man of dignity concurred with them in that opinion.

2 *Of reſtoring a Minor, the Tutors having been negligent.*

D. 4. 4. 38.

Æmylius Largianus, bought a certain piece of ground of *Obinius*, and received in hand ſome part of the price, with this condition, That if within foure months, the reſt of the price were not paid downe, the ſale ſhould bevoyde: Within the foure months, *Largianus* dyed, and *Rutiliana* his daughter, being under the age of twelve years, ſucceeded as his heyre; Her Tutors neglecting to pay the reſt of the price, *Obinius* (having oftentimes given them warning, and called upon them) after a years ſpace, ſold the ſame ground to *Claudius Telemachus*. *Rutiliana* ſued to be reſtored. The caſe being heard by the Prætor, ſhe was over ruled, and left without reliefe, whereupon ſhe appealed to the Emperour, who adviſed with *Paulus*, about her caſe. *Paulus* told him, That it was his opinion, that ſhe was juſtly overruled, becauſe the buſineſſe was contracted with her father, not with her. But the Emperour was otherwiſe inclined, becauſe the time, wherein the ſale was to become voyd, happening after the eſtate, and intereſt was in her, and then by the Tutors negligence, the conditions of the ſale were not performed. *Paulus*, then better conſidering of the buſineſſe ſaid, That he thought indeed, ſhe might the better be reſtored, Becauſe *Obinius*, after the day, wherein it was agreed, that the ſale ſhould become voyd, had given warning to the Tutors, to pay in the remainder of the price, by demanding whereof, he ſeemed to recede from

that

that advantage, which he had of making the ſale voyde; beſides, the cauſe, or condition of making the ſale voyd, was held no way favourable; ſo that it was reſolved, and pronounced, That ſhe ſhould be reſtored: The Emperour was alſo the more inclined to her, becauſe, the Tutors neglecting not only to pay the mony, but alſo to deſire reſtitution on her behalfe, ſeemed to have been conſenting to betray her buſineſſe.

3 *Of a Promiſe procured by Force.*
D. 4. 2. 9. § 3.

WHen the Campanians by force, and feare, had cauſed a ſtranger, to promiſe in writing, a great ſumme unto their Citty; The Prætor, by the directions of the Emperour, *Vlpian* being his Aſſeſſor, ordered, That if he had performed the promiſe, he ſhould recover, what he had paid, by way of action, if he had not performed it, and were ſued, he ſhould plead, that he was conſtrained by force.

4 *Of recovering a mans own by force.*

D. 4. 2. §§ 13. & 13.

IF a Debtor be compelled to pay what he owed, he ſhall not be relieved by the Prætors Edict, ſaies *Julianus*, becauſe he is not damnified, but he that committed the force, ſhall forfeit the debt; To that purpoſe *Marcus* the Emperour told *Marcianus*, If you have any cauſe of ſuit, it had been your beſt courſe, to have proſecuted it in a Legall way; and when *Marcianus* anſwered, That he had uſed no violence, the Emperour replyed,

replied, you think there is no violence, without wounds, or blowes. It is violence, if any man ſtrive againſt anothers will, to take what is due unto him, without any judiciall order, and thereupon declared, That if any one ſhould be proved, to have gotten mony, or goods from his debtor, without his conſent, and to have acted as a Judge in his own cauſe, he ſhould looſe his debt.

5 *Of Wages due, where no fault is in him that was hired.*

D. 19. 2. 19. § 9.

ANtonius Aquila a Senator of Rome, conditioned with one, who was a cunnning workman, to pay him for his ſervice twenty pounds for one yeare; ſome time of the yeare being ſpent in the ſervice, the Senator died, and the heyre refuſed to pay the wages, whereupon the workman complained to the Emperours *Antoninus* and *Severus*, who returned anſwer to the Petition, That in caſe, as it was related, he were ready to have done his ſervice to *Aquila*, and no failing was on his part, it was juſt, that he ſhould receive his whole wages, unleſſe he had been hired, and paied for the ſame time by ſome other man: and ſo *Papinian* ſaies, That the Emperours deputy dying in a remote province, his Retinue or Attendance ought to have their appointed allowance, if they were not entertained, for the ſame time by ſome other.

6 *Of*

6 *Of Sureties being Liable for no more then they undertooke.*

D. 46. 1. 68. § 1.

AVrelius *Romulus*, taking ſome publique Cuſtomes to farme, *Petronius Thallus* and others became bound for him, as ſureties, for the payment of a hundred pounds yearly, to the Exchequer, *Romulus* himſelfe failing in payment, the Officers of the Exchequer ſeized his goods, and ſued the ſureties, both for the principall debt unpaid, and for the Intereſt; whereupon they petitioned the Emperour, who upon reading of the bond, whereby it appeared, that they undertook, only for a hundred pounds a yeare, not for the whole burthen, or charge Declared, That they were not liable for the intereſt; and Ordered, that *Romulus* his goods ſhould be extended, for paiment of the intereſt, and of the principall debt, ſo farre as their value would reach, and that the ſureties ſhould be held liable only for the remainder; as it is practiſed, when goods engaged or pawned, are ſold for paiment of debts.

7 *Of a Legacy, recoverable from the heyres, not payable, as was appointed.*

D. 32. 1. 27. § 2.

IVlianus *Severus* made his ſonnes *Paulus* and *Julius* his heyres in his Will, and bequeathed, fifty pounds to *Cornelius* his Nephew, and willed that *Julius Maurus* his Bayliffe, ſhould pay the ſame, out of the rents of his grounds due unto him; The Officers of the publique Treaſury, queſtioning the eſtate of *Julianus Severus*, and requiring thoſe rents,

Julius

Julius Maurus was compelled to pay them unto them; afterwards the heyres of *Julianus Severus*, obtained a ſentence for the eſtate, againſt the Officers of the publique Treaſury. The Nephew to whom the Legacy was given, ſued *Maurus* for the ſame; the Emperour being petitioned declared, That the Legacy was not due from *Maurus*, but that it was ſignified by the Teſtator, whence it might be paid, and therefore referred him, to recover it againſt his heyre.

SECT. II.

Of Cauſes Teſtamentary.

1 *Of right to Legacies in a Will, where the names of the Heyres are blotted out.*

D. 28. 4. 3.

Marcellus relates a Caſe, which in his time was debated in the Emperours preſence, concerning one, who having made his Will, blotted out the names of his heyres, (ſuppoſing them unworthy;) in which caſe, the eſtate, after the Teſtators death, became confiſcated; The queſtion was, Whether the Legacies given in that Will, ought to be performed? Some being of opinion, That the Legacies were made voide; others, That no more was voide, but what was expunged, and that in a doubtfull caſe, it

it was the juſteſt, and ſafeſt way to make a favourable conſtruction. He recites the caſe, pleading, and ſentence given by the Emperour *Antoninus*, The caſe was thus, *Valerius Nepos* had made his Will, and afterwards obliterated the names of thoſe, whom he had written his heyres; The Emperour ſaid, That the Legataries could pretend no right; and told the Advocates of the Treaſury, That they ſhould remove the cauſe to the Judges thereof; *Vivius Zeno* being a Legatary in the Will, ſaid, I beſeech your Majeſty, to heare me patiently, What doe you conceive ſhall become of the Legacies? Whereupon the Emperour ſaid, Doe you think, that he who ſtruck out the names of his heyres, would have the Will ſtand good for Legacies? Then *Cornelius Priſcianus* Advocate for *Vivius Zeno* replied, He cancelled only the names of the heyres: Then *Calphurnius Longinus* Advocate for the Treaſury, Affirmed that there can no Will be good in any part, wherein there are no heyres; to whom *Cornelius Priſcillianus* anſwered, He did not only bequeath Legacies but gave freedome unto Bondmen; The Emperour having heard what was ſaid on both ſides, commanded the parties, and Councell to withdraw, and having conſidered of the buſineſſe, willed, that they ſhould be againe admitted into his preſence, and then declared, That he held it requiſite, to make the moſt favourable conſtruction in that buſineſſe, which was, That that only ſhould be held voyd, which was expunged, & although he had expunged the name of one Bondman, whom he had made free, yet he pronounced, that he alſo ſhould be free, which it ſeems he granted in favour of freedome,

2 *Of an Heyre made in ſtead of one ſuppoſed to be dead*

D. 28. 5. 92.

P*Actumeius Androſthenes*, made *Pactumeia Magna* daughter to *Pactumeius Magnus*, heyre to his whole eſtate; and in caſe ſhe ſhould faile, and her Father ſurvive her, he ſubſtituted her father, in her place as heyre; It happened, that *Pactumeius Magnus* was ſlain, and it being commonly reported, That his daughter alſo was dead; *Androſthenes* altered his Will, and made *Novius Rufus* his heyre, premiſing theſe words, Becauſe I could not be ſo happy, as to have thoſe myne heyres, whom I intended, Therefore *Novius Rufus* ſhall be my heyre. *Pactumeia Magna* petitioned the *Emperour* to be relieved againſt that Will; and the cauſe being heard, although there was a reaſon inſerted, for making *Novius Rufus* his heyre; yet becauſe a falſe rumor ought not to create a prejudice; the Emperour, reſpecting the Will, and intention of the Teſtator, thought ſhe was to be relieved; and pronounced, That the eſtate or inheritance, belonged to *Pactumeia Magna*, but withall, that ſhe ought to performe the Legacies, given in the latter will, even as farre, as if ſhe her ſelfe had been appoynted heyre therein.

3 *Of an Heyre truſted ſpending the eſtate.*

D. 36. 1. 54.

C*Aius* made *Titius* his heyre, and requeſted of him, that what ſhould remaine of his eſtate, at the time of *Titius* his death, might be reſtored to *Mævius*. *Titius* before his death alienated, and

nd ſpent much of the eſtate. It was queſtioned, whether *Mævius* might recover any thing by way of ſatisfaction, from *Titius* his heyre? *Papinian* anſwered, That if it were alienated, or ſpent purpoſely, to diminiſh the eſtate, which was intended to *Mævius*, he might recover ſome thing; but if that could not be proved, He had no cauſe of action; becauſe in matters of truſt, faire dealing only is required. But the Emperour *Marcus*, ſaies he, having the conuſance of a cauſe, concerning an eſtate left in truſt, in the ſame manner, declared, That the exſpences, pretended to have been made neceſſary about the eſtate, ſhould not wholly be charged upon it, but if the heyre, had ſome other eſtate of his owne, his exſpences ſhould be laaid proportionably on that, together with the other; Which determination of the Emperour, *Papinian* confeſſeth conſiſted with Equity, and was not without an example; For when a Fathers eſtate, was to come into a diſtribution amongſt brothers, whereof one being a Soulſier, had a peculiar eſtate of his owne, which he had gained by his ſervice, and demanded allowance, for what he had disburſt for his proper maintenance; The Emperour determined, that thoſe diſburſements ſhould be charged, as well upon his own peculiar, as upon his Fathers eſtate.

4 *Of the Father waſting an Eſtate intended to his Sonne.*

D. 36. 1. 54.

L*Vcius Titius* made *Junius Cerealis* his heyre, and requeſted him, to confer the eſtate upon *Junius Simonides* his Sonne, when he ſhould be at his own diſpoſing; The Father prodigally waſting the eſtate, complaint was made, on behalfe of the ſonne, to the Emperour *Adrian*, who, the matter being proved, decreed, That the Father ſhould forthwith render up the eſtate, and have nothing to doe with it, during his ſonnes life; for, becauſe he had formerly waſted the eſtate, and it did not agree with the reſpect, due from the ſonne to the Father, to make him put in ſecurity to preſerve the eſtate, (which amongſt other perſons might have been done) the Emperour deprived him of that benefit, which was given him by the will, yet it was thought proper, for the reverence due to the Father, from the Sonne, that if the Father fell into want, the Judge might take order, that he ſhould be maintained, out of the profits of his Sonnes eſtate.

5 *Of compelling one to performe a truſt.*

D. 36. 1. 16. §17.

IN the time of the Emperour *Antoninus Pius*, there happened ſuch a caſe. *Pamphylus* in his will made *Theodatus*, and *Evareſtus* his heyrs, and bequeathed his Bondman *Hermias* to *Theodatus*, and required him, when he had taken upon him as heyre, to make *Hermias* free; and required of *Evareſtus*, when *Hermias* was free, to convey unto him, that

that part of the eſtate, which might come to him as heyre, which he had left unto him only in truſt, for that purpoſe; *Theodatus* taking upon him as heyre, made *Hermias* free, but *Evareſtus*, ſuſpecting the eſtate might prove troubleſome, refuſed to take upon him as heyre, and to intermeddle therewith, whereupon the Emperour being petitioned unto by *Hermias*, gave order to *Caſſius Dexter* the Judge, to compell *Evareſtus* to take upon him as heyre, and according to the truſt to convey the eſtate unto *Hermias*.

6 *Of a Legacy left by way of Confidence.*

D. 31. l. 66. § 10.

ONe in his laſt Will wrote, That he made no doubt, but that his Wife, would leave unto their children, whatſoever ſhe received of his eſtate. It was queſtioned, whether ſhe were bound by thoſe words? The Emperour *Marcus* declared that ſhe was bound, as much as if he had given her an eſpeciall charge to that purpoſe; and *Papinian* ſaies, That the Emperours reſolution was very neceſſary, That the confidence of a kind Husband, might not prove prejudiciall to the children, which ought to be as deare unto the Wife, as to himſelfe.

SECT. III.

Of Reforming or Confirming ſentences given by other Judges.

1 *Of an Examination unduely taken by Torture.*

D. 48. 18. 20.

A Husband being heyre to his Wife, demanded mony of *Surus*, which he ſaid, his Wife in his abſence, had left in truſt with him, and to that purpoſe produced one witneſſe, and deſired, the defendants Maid ſervant might be examined by torture, *Surus* denied that he received any ſuch Mony, and ſaid, that his Servant ought not to be examined in that manner; but the Judge examined the Maid, as was deſired, and finding her to agree with the other witneſſe, condemned *Surus*, who thereupon appealed to the Emperour, who being inform'd of the proceedings, pronounced That the Maid ſervant was unduely examined, and that credit was not to be given to one witneſſe, and therefore *Surus* had juſt cauſe to appeale.

2 *Of*

2 *Of a ſentence confirmed by the Emperour, touching the negotiation of a Factor.*

D. 14. 5. 8.

Titianus intruſted his ſervant, with power to lend monies, and to take pledges or pawnes, and the ſame ſervant, did likewiſe undertake for others, who bought Barly, and paid for what he undertook; when the ſervant was run away, one who had truſted him, for the price of ſome Barly ſued the Maſter, the Maſter pleaded, he was not liable, becauſe he gave his ſervant no commiſſion for ſuch buſineſſes, but when it was proved; that the ſame ſervant, had provided ſtorehouſes for Corne, and had paid divers others for the like commodities, The Preſident or Judge, in ſuch cauſes gave ſentence againſt the Maſter; The cauſe being appealed, *Paulus* ſaid, that there was a difference betwixt the Servants contracting himſelfe, and undertaking by way of ſurety-ſhip for others; and that it was not likely, that the Maſter gave him any ſuch commiſſion, and therefore could not be obliged by ſuch his undertakings; But becauſe it appeared, that he had a generall power to act under, and for his Maſter; the Emperour confirmed the ſentence.

3 *Of the heyres of one indebted to the Publique, to be ſued before thoſe, who bought of the eſtate.*

D. 49. 14. 47.

A Woman called *Moſchis*, being indebted to the publique Treaſury, left her eſtate unto her heyres; of whom *Faria Sinilla* and others bought certain grounds, thoſe being ſued for the

debt, and arrears of *Moschis*, pleaded that her heyres were sufficiently able to pay the debt; The Emperour thought reasonable, that the heyres should first be sued, and that what could not be recovered from them, should afterwards be raised by those who were in possession of the estate.

4 *Of a sentence given by combination and corruption of Witnesses.*

D. 42. 1. 33.

Julius Tarentinus, presenting his Petition to the Emperour *Adrian*, complained, that by the combination of his adversaries, with false witnesses, corrupted with mony, the Judge had been swayed, to give sentence against him, and besought, that he might be relieved, or restored against that sentence; whereupon the signified his mind to the Prætor, in this manner, I have given order, that the Petition of *Julius Tarentinus* presented unto me, be sent unto you; and if he shall make it appeare, that he hath been oppreſt, by combination of his adversaries, and corruption of witnesses; I wish that you severely punish it, and, if by such ill courses, the Judge hath been abused, let him be restored against that sentence.

5 *Of an Advocate compounding for the event of the Suit.*

D. 17. 1. 6. § 7.

Daphnis being sued for land which he held, and the profits thereof received by him: *Marius Paulus* his Advocate, in consideration of mony given, became surety that *Daphnis* should performe

forme the Sentence of the Court; and then covenanted with *Daphnis*, That in case he should prevalle in the suit against his adversary, that he should convey the fifth part of the land, to a friend to his use. The Sentence passing against *Daphnis*. *Claudius Saturninus* the Prætor, ordered that *Marius Paulus* should see the Land restored, and pay ten pounds for the profits received; and for that contrary to the Law he had contracted for part of the Land to be conveyed upon the event of the suit, he suspended him from pleading as an advocate. *Marius Paulus* having an intention to sue *Daphnis* for what he had been enforced to pay, by occasion of his foreiship. The Emperour being informed thereof, declared that he should have no remedy; because he had made an unlawfull contract.

TITLE

TITLE VII.

Of Judicature in Cauſes Criminall.

Iudicature in Cauſes Criminall is, when before ſpeciall Iudges appointed to that purpoſe, Offences done againſt the Publique, are proſecuted for the inflicting of due puniſhment, concerning which, Caſes and Queſtions happen; 1. Touching the manner of Proceedings. 2. Touching the Offences committed, 3. Touching the effect of the Proceedings and Sentences.

SECT. I.

The manner of Proceedings is in the Diſcovery, Apprehending, and tryall of Offendors.

1 *Of Informations given againſt Offendors.*
D. 48. 3. 6.

THe Emperour *Adrian*, being conſulted by *Julius Secundus*, concerning the informations given againſt Offendors, wrote unto him. This is not the firſt time, that notice hath been given, that too much credit

credit ought not to be had to their advertiſements, who take upon them to condemne, inſteed of informing; And the directions of *Antoninus Pius* the Emperour are extant, which he publiſht, when he had the goverment of Aſia, to this purpoſe; That the Conſervators of the Peace, when they had apprehended violent Theeves, ſhould examine them, concerning their Companions and Receivers, and that they ſhould ſend their examinations incloſed, and ſealed to the Preſident, and therefore they, who were ſent, together with the accuſations, ought to be heard againe, although any thing were ſignified by letters, or delivered by the Conſervators themſelves, and ſo both the ſame Emperour, and others, ſignified concerning thoſe, who were detected, and ordered to be enquired after; That they were not preſently, to be taken for guilty perſons, but to be newly proceeded againſt, if there were any, who could prove any thing againſt them, And therefore, when the Præſident intended to examine the buſineſſe, he ſhould appoint the Conſertor of the peace, to attend, and to maintaine what he had informed, and if it be found, that he had diligently, and faithfully diſchargéd his duty, he ſhould commend his ſervice, but if it were indiſcreetly done, and upon no good ground, he ſhould tax his negligence; but if he found that his enquiries were captious, to entrap perſons, or the Teſtimonies were miſreported, he ſhould inflict on him, ſome puniſhment for example ſake, that he might not preſume hereafter to doe the like.

2 *Of one accuſed undertaking to accuſe another.*

D. 48. 1. 5.

IF one ſtand accuſed, it concernes him to clear himſelfe, neither can he be admitted to accuſe others, before he himſelfe be acquitted, For ſo it is ordained, by the Imperiall Conſtitutions, that parties accuſed clear themſelves, by ſhewing their own innocence, not by charging crimes on other men, But this ſaith *Vlpian*, is queſtionable, whether he only may accuſe another, who is acquitted, or whether he alſo, who hath undergone the puniſhment due for his fault, in regard the Emperours have declared, that after one is condemned, he may not undertake to maintain an accuſation, but he is of opinion, That that is meant, of ſuch as are condemned to ſlavery, or baniſhment.

3 *Of one being accuſed, of what he was once acquited.*

D. 48. 2. 7. § 2.

THe Emperour *Antoninus Pius* ſignified to *Salvius Valens*, that the Preſident ought not to ſuffer one, to be accuſed of a crime, of which he had formerly been acquitted; But *Vlpian* ſaies, It is conſiderable, whether it be intended of the ſame accuſer, or of another, and he is of opinion, That in regard, a judgement paſt betwixt ſome, makes no prejudice to others, If one who appears as a freſh accuſer, proſecutes a cauſe, wherein he hath an intereſt, and can prove, that he had no notice of the former proceedings, out of ſome weighty reaſon, he may be admitted.

4 *Of*

4 *Of the ſame accuſer, of another crime.*

D. 48. 2. 7. § 3.

HE who failed to make good an accuſation touching one crime, offered to charge the ſame perſon with another: *Vlpian* was of opinion, that he ought not eaſily to be admitted, yet he confeſſeth, That the Emperour *Antoninus Pius*, wrote to *Julius Candidus*. that although the Father had failed, in maintaining an accuſation, his Sonne ought to be allowed, to charge the ſame perſon, with ſome other crime.

5 *Of an Offendor offering Baile.*

D. 48. 3. 3.

Antoninus Pius the Emperour, being conſulted by the Citizens of Antioch, what they might doe with an offendor, who offered baile; wrote unto them, That he, who would put in ſureties for his appearance, ought not to be kept in priſon, unleſſe it be manifeſt, that he hath committed, ſuch an offence, that he ought neither to be truſted upon his giving of ſureties, nor on commitment to any guard, but ought to be uſed, as if he had deſerved to undergoe the puniſhment of impriſonment, before he came to ſuffer that, which was to be inflicted for his offence.

6 *Of Proceeding againſt an Offender abſent.* D. 48. 19. 5.

TRajan the Emperour being conſulted, by *Julius Fronto* the Proconſvl, Reſolved him, that a perſon abſent ought not to be condemned, in a Criminall cauſe, and ſignified to *Aufidius Severus*, That no man was to be condemned upon ſuſpition; becauſe it was better a guilty perſon ſhould be abſolved, then that an innocent perſon ſhould be condemned. But if men accuſed were obſtinate, and refuſed to obey the ſummons, and decrees of the Magiſtrate, they might, ſaies *Vlpian* be condemned, although they never appeared in judgement, in Criminall cauſes, as it is uſuall in cauſes private, and Civill, which he ſaies may be maintained, without imputation of contradiction, And putting the queſtion how? He anſwers, If the penalty of a crime be only pecuniary, or ſuch as tends to the deminution of Credit, if being often ſummond, he obſtinately abſent himſelfe, he may be proceeded againſt ſo farre, as to a baniſhment for a time; but if the crime requires a heavier cenſure, as the depriving him of life, or liberty, ſuch penalties ought not to be inflicted upon abſent perſons.

6 *Of Crimes committed by the ſame Perſon, in ſeverall Provinces.*

WHen one who had cõmitted Sacriledge in one Province, was appehended for a leſſer crime in another, *P. Proculus* the judge, conſulted the Emperour *Antoninus Pius* what was to be done, who gave directions, that he ſhould firſt try

try him, for the crime, for which he was apprehended, and then ſend him to the place, where the ſacriledge was committed.

SECT. II.

Of Publique Offences, as Homicide, Parricide, Treaſon, &c.

1 *Of the intent in Man-ſlaughter.*

D. 48. 8. 1. § 3.

ADrian the Emperour, to a petition, concerning one who was ſlaine, where the intention was doubtfull, returned this anſwer. He that hath killed a man, if he did it not, with a purpoſe of killing him, may be acquitted, and he who wounded a man, with a mind to kill him, although he killed him not, ought to be condemned, as a man-ſlayer, and that it is to be determined, from the circumſtances of the fact, for if he drew a ſword, and ſtruck a man therewith, it ought not to be doubted, but that it was done with a purpoſe of killing him, but if he ſtruck him with a key, or with a pike-ſtaffe, albeit with an Iron poynt, it ſhall not be thought, that it was done with a mind to kill him, and his puniſhment ought to

to be mitigated, who in a fray, or ſuddain quarrell, kills a man rather by chance, then of ſet purpoſe.

2 *Of killing perſons found in* Adultery.

D. 48. 5. 20. 22. 24. & 38.

IT was lawfull ſaith *Pupinian*, for the Father to kill an Adulterer with his daughter, found in the fact in his own houſe, and it was lawfull for the Husband to kill a perſon of baſe condition, found in Adultery with his Wife, and as he obſerves, there was more power given to the Father, then to the Husband, to kill the Woman, and the Adulterer without diſtinction. Becauſe the tenderneſſe of a Father, will make him more circumſpect in his reſolution, but the heat and raſhneſſe of a Husband, needed to be limited. Yet *Marcus Antoninus* and *Commodus* his ſonne being Emperours, and conſulted upon occaſion of the Husbands killing his Wife, returned anſwer, If the Husband tranſported with indignation and griefe, killed his Wife found in Adultery, he ought not to be puniſht with death, giving for reaſon, that the Emperour *Antoninus Pius* ſignified his mind to that purpoſe to *Apollonius*; the puniſhment of death, ſaid he, may be remitted to him, who doth acknowledge that he killed his Wife, found in Adultery, becauſe it is a moſt difficult thing to overcome a paſſion, juſtly conceived; yet becauſe in taking his own revenge, he did more then may be juſtified, he ought not to goe unpuniſht; and therefore it may ſuffice, if he be a perſon of mean condition, to condemne him to the Mines; if he be one of better quality, to confine him to ſome Iſland.

3 *Of Acceſſaries to Man-ſlaughter.*

D. 29. 5. 3. §4.

IF the Maſter of a Family were killed in his own houſe, if any of his Bondmen were faulty, in not defending him, he was to ſuffer death. It happened, that one was Bondman to two partners, in the ſame houſe, both being aſſaulted, he reſcued the one, but not the other; It was queſtioned, whether he ought to ſuffer, for that he did not reſcue both? *Vlpian* ſaid, If it were in his power to have helped both, and he had neglected one, he might juſtly ſuffer; but if, when he could not relieve both, he choſe rather to help one, it were hard to ſay, that he offended, in haſting to help one rather then the other.

4 *Of a Minor not helping his Maſter.*

D. 29. 5. 3. 14.

THe Law not extending to Bondmen, under the age of fifteen, yet *Trebius Germanus*, being Proconſul, put to death a Bondman within that age: and not without reaſon, ſaies *Marcianus*, for the young man did not want much of the age of fifteen, and lay at his Maſters feet, when he was ſlaine, and did not afterwards reveale the ſlaughter and as it appeared, that he could not help his Maſter in that caſe, ſo it was certain, that he made no diſcovery afterwards; and ſuch as are Minors, yet if they be of ſufficient underſtanding, to diſcerne ſuch a villany, they are no more to be ſpared, in caſe of their Maſters death, then of any other miſchievous act.

5 *Of Parricide, committed by one ſuppoſed Madde.*

D. 1. 18. 13. & 14.

Marcus and *Verus* the Emperours being conſulted by *Scapula Tertillus* concerning *Ælius Priſcus* who hed killed his Mother, adviſed as followeth; If it clearly appeare unto you, that *Ælius Priſcus* was ſo diſtracted: with a totall continued, defect of underſtanding, that there could be no ſuſpition, that in a diſſembled madneſs, his mother was killed by him, you may deſiſt from the puniſhment of him, his madneſſe it ſelfe, being a ſufficient puniſhment, yet you are to take care, that he be kept in more cloſely; becauſe ſuch reſtraint ought to be uſed, for his puniſhment, and preſervation, and alſo for the ſecurity of others; But if, as often times it happens, his madneſſe takes him by fitts, and at the time of the villany committed, he was free, he ought not to be excuſed, by colour of his diſeaſe, and touching this, you are to make good enquiry, that we being informed, may determine of the fouleneſſe of the fact: And whereas we underſtand, by your letters, that he is kept at his Country houſe by ſervants, and friends of his own, you ſhall doe well, to call before you, ſuch as at that time attended him, and to examine throughly how, and by what negligence, the fact happened to be committed, and as you ſhall find any of them more or leſſe faulty, to cenſure them accordingly. For guards, or keepers are appointed for mad men, not only to look that they doe not miſchiefe to themſelves, but alſo that they be not deſtructive to others, which if it be done, it may be well imputed to their fault, who were more negligent then was fit in their imployment.

6 *Of*

D. 48. 2. 20. & 48. 4. 11.

IT is generally obſerved, that for crimes proſecuted in the way of publique Judicature, the penalty, or forfeiture of goods, falls not upon the heyres, unleſſe ſentence be given, in the life time of the offendor, But *Modeſtinus* ſaies, It is otherwiſe in Treaſon, which may be proſecuted againſt the heyrs, to make goods confiſcated, although the parties be dead, and that *Severus* and *Antoninus* the Emperours declared, that he that was guilty of that crime, might not alienate any of his goods, after the time of the fact committed. But *Vlpian* ſaies, that every one that is guilty of Treaſon, is not of that condition, but he that is a Traitor in an eminent degree, as ſuch who with an affection of enemies, practice ſomething againſt the Prince, or the Commonwealth.

SECT. III.

Of the effect of Criminall proceedings.

The effect of Criminall proceedings, is the Validity of Confeſſion, voluntarily or upon Torture, of Reſpit given for Execution, of Pardon, or Reſtitution, and the like.

1 *Of confeſſion voluntarie, and upon Torture.*

D. 48. 18. 1. § 27.

HE is not alwaies to be believed, ſaith *Vlpian*, who voluntarily confeſſeth, he hath committed ſome hainous crime, for ſometimes upon feare, or ſome other occaſion, men betray themſelves, as appears by a letter

a letter written by the Emperours, to *Voconius Saxa*, who had signified to them, what happened in a cause wherein he had proceeded; Wellbeloved *Saxa* we cannot but commend your great discretion, and moderation, in that you condemned *Primitius* the Bondman, who out of feare to returne to his Master, confest that he had killed a man, he persisting in the same relation; as also for your Enquiry, by torture, after his complices, whom he falsely impeacht as well as himselfe, that you might the better discover the truth of his confession; and that your providence was to good purpose, it afterwards appearing, upon the torture, that he had foolishly wronged himselfe, and others; you may therefore dispence with your sentence, and give order he be sold, that he may not returne againe under the power of his Master, who we believe, will be contented, to receive the price, and part with such a servant.

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2 *Of Offendors condemned, restored.*

D. 48. 23. 2. & 3.

ONe who for an offence, had a punishment inflicted, whereby he lost his freedome, and his goods, was restored to his freedome, but had his goods retained as forfeited to the publique Treasury; *Papinian* being consulted, answered, That his Creditors could bring no action against him, for any debt contracted by him before his punishment; but if he were restored to his goods, as well as to his freedome, he was liable to any ordinary action: *Vlpian* adds, That if he were restored to both by the Prince, but to avoid mens actions, he relinquisht the benefit of his goods, he cannot thereby free himselfe, from actions to which he formerly was subject.

FINIS.